Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

HARVARD LAW SCHOOL
LIBRARY

Jan 31 32

# REPORTS

OF

## CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF JUDICATURE

OF THE

## STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED AND AN INDEX.

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 91,

CONTAINING CASES DECIDED AT THE MAY TERM, 1883, NOT REPORTED IN VOLS. 88, 89 AND 90, AND CASES DECIDED AT THE NOVEMBER TERM, 1883.

O-12/28/91

INDIANAPOLIS:
CARLON & HOLLENBECK, PRINTERS AND BINDERS.
1884.

Entered according to the Act of Congress, in the year 1884,
By FRANCIS M. DICE,
In the Office of the Librarian of Congress, at Washington, D. C.

Rec. July 28, 1884

PRINTED AND BOUND BY
CARLON & HOLLENBECK,
INDIANAPOLIS.

ELECTROTYPED BY
WANAMAKER & CARSON,
INDIANAPOLIS.

# TABLE OF THE CASES

## REPORTED IN THIS VOLUME.


Able et al., Adm'rs, Warren et al. v. 107
Adams, Citizens State Bank of Newcastle v. 280
Adams et al., Carmichael v. 526
Ætna Ins. Co. v. Weissinger, Adm'r 297
Agnew, Adm'r, Hoover v. 370
Allwein, Sheriff et al., Hose v. 497
Anderson v. Caldwell 451
Anderson, City of, Rozell v. 591
Armstrong, Board of Comm'rs of Howard Co. v. 528

Baird, Walls et al v. 429
Barnes v. Union School Tp. 301
Barnes et al. v. Jones 161
Bates, Cleveland, Columbus, Cincinnati and Indianapolis R. W. Co. v. 289
Bell, Fischer v. 243
Benham v. State, ex rel. Richardson 82
Board of Comm'rs of Greene Co. v. Huff et al. 333
Board of Comm'rs of Howard Co. v. Armstrong 528
Board of Comm'rs of Morgan Co., Robbins v. 537
Bosworth, Wayne Pike Co. v. 210
Bowen et al. v. Eichel 22
Boyce v. Graham 420
Boyce et al. v. Murphy et al. 1
Brake et al. v. Brownlee, Adm'x 359
Brier, Hardy et al. v. 91
Brookville and Metamora Hydraulic Co. v. Butler et al. 134
Brown v. Summers et al. 151
Brownlee, Adm'x, Brake et al. v. 359
Bunger, Powell et al. v. 64
Burgett et al. v. Teal et al. 260
Burk, Ex'r, Taylor v. 252
Burns et al. v. Thompson 146
Butler et al., Brookville and Metamora Hydraulic Co. v. 134
Butt v. Butt et al. 305

Caffyn, Auditor, v. State, ex rel. Rader 324
Caldwell, Anderson v. 451
Calvert v. State 473
Carmichael v. Adams et al. 526
Case et al. v. Johnson et al. 477
Chalfant v. Payton et al. 202
Champ, Elliott et al. v. 398
Cicero, Town of, et al. v. Williamson et al. 541
Citizens State Bank of Newcastle v. Adams 280
City of Indianapolis v. Murphy 382
City of Peru v. Gleason 566
City of Anderson, Rozell v. 591
City of Huntington et al., Faust v. 493
Cleveland, Columbus, Cincinnati and Indianapolis R. W. Co. v. Bates 289
Cleveland, Columbus, Cincinnati and Indianapolis R. W. Co. v. Coburn et al. 557
Coburn et al., Cleveland, Columbus, Cincinnati and Indianapolis R. W. Co. v. 557
Combs v. Nelson 123
Conley v. Dibber 413
Conner et al. v. Wells 197
Crawford et ux. v. Thompson 266
Creamer v. Sirp 366
Crooks et al., Dillman et al. v. 158

Dennis et al. v. State 291
Detchon et al., Jones et al. v. 154
Detrick, Louisville, New Albany and Chicago R. W. Co. v. 519
Dewey et al. v. State, ex rel. McCollum et al 173
Dibber, Conley v. 413
Dillman et al. v. Crooks et al. 158
Dodd v. Moore, by Next Friend 522
Dufour et al. v. Kious 474

Dudley v. State.....312
Dufour et al. v. Kious.....409
Dupies, State v.....233
Dykins, Auditor, et al., Traylor et al. v.....229

Earle v. Earle..... 27
Eaton v. McKahan et al.....109
Eichel, Bowen et al. v..... 22
Elliott et al. v. Champ.....398
Engle, Adm'r, Levi et al. v.....330
Eve v. Louis et al.....457
Excelsior Mutual Aid Ass'n of Anderson v. Riddle..... 84

Falls, Foulks v.....315
Faust v. City of Huntington et al..493
First Nat. Bank of Huntington et al., Helm et al. v..... 44
Fischer v. Bell.....243
Force, Piper et al. v.....373
Fordyce v. Nelson.....447
Foulks v. Falls.....315
Fowler et al. v. State.....507

Gleason, City of Peru v.....566
Graham, Boyce v.....420

Haas et al. v. Shaw et ux.....384
Hallowell, State v.....376
Hardy et al. v. Brier..... 91
Haw Creek T. P. Co., Sidener et al. v.....186
Hays v. Tippy et al.....102
Hays, Morgan v.....132
Helm et al. v. First Nat'l Bank of Huntington et al..... 44
Herron et al. v. Herron.....278
Hess, Sheriff, Smith v.....424
Hoover v. Agnew, Adm'r.....370
Hose v. Allwe'n, Sheriff, et al.....497
Huff et al., Board of Comm'rs of Greene Co. v.....333
Huntington, City of, et al., Faust v.493

Indiana, Bloomington and Western R. W. Co. v. McBroom.....111
Indiana Nat'l Bank of Indianapolis et al., Mullaney et al. v...77
Indianapolis, City of, v. Murphy..382

Johnson v. Ramsay.....189
Johnson et al., Case et al. v.....477
Jones v. Jones et al.....475
Jones, Adm'r, v. Jones.....378
Jones et al. v. Detchon et al.....154
Jones et al. v. Jones et al..... 72
Jones, Barnes et al. v.....161

Kackley et al. v. State, ex rel. Heitz.....437
Keesling v. Watson, Adm'r.....578
Kenney et al. v. Phillipy.....511
Kious, Dufour et al. v.....409
Kious, Dufour et al. v.....474

Lawyer et al., Wallace et al. v...128
Leaman v. Sample.....236
Levi et al. v. Engle, Adm'r.....330
Long, State, ex rel. Ault, v .....351
Louis et al., Eve v.....457
Louisville, New Albany and Chicago R. W. Co. v. Detrick..... 519
Louisville, New Albany and Chicago R. W. Co. v. Quade.....295
Louisville, New Albany and Chicago R. W. Co. v. Smith.....119

May v. Rice, Auditor .....546
McBroom, Indiana, Bloomington and Western R. W. Co. v.....111
McCulloch v. McDonald et al.....240
McDonald et al., McCulloch v....240
McKahan et al., Eaton v.....109
Mescall v. Tully et al..... 96
Miller, Muncie National Bank v..441
Millikan et ux. v. Patterson.....515
Mitchell v. Tomlinson.....167
Moore, by Next Friend, Dodd v..522
Morgan v. Hays .....132
Morrison, Wells v..... 51
Muegge et al., Sanders v.....214
Mullaney et al. v. Indiana Nat'l Bank of Indianapolis et al..... 77
Muncie National Bank v. Miller..441
Murphy, City of Indianapolis v..387
Murphy et al., Boyce et al. v..... 1

Nelson, Combs v.....123
Nelson, Fordyce v.....447
North River Bank v. State, for use of Busenburg.....476

Over et al. v. Shannon et al..... 99

Patterson v. State, ex rel. Day...364
Patterson, Millikan et ux. v.....515
Payton et al., Chalfant v.....202
Peru, City of, v. Gleason.....566
Phillipy, Kenney et al. v.....511
Piper et al. v. Force.....373
Pittsburgh, Fort Wayne and Chicago R. W. Co. v. Swinney.....399
Powell et al. v. Bunger..... 64
Pratt et al., Rawson et al. v..... 9
Pruitt v. Pruitt et al.....595

Quade, Louisville, New Albany and Chicago R. W. Co. v.....295

Ramsay, Johnson v.....189
Rawson et al. v. Pratt et al..... 9

Reigelsberger v. Stapp.....311
Rice, Auditor, May v.....546
Riddle, Excelsior Mutual Aid Association of Anderson v..... 84
Rinehart v. Rinehart..... 89
Robbins v. Board of Comm'rs of Morgan Co.....537
Roche, Adm'r, et al., State, ex rel. Dunham, v.....406
Rowley, Adm'r, Wallace et al. v..586
Roy v. State.....417
Rozell v. City of Anderson.....591

Sage v. State.....141
Sample, Leaman v.....236
Sanders v. Muegge et al.....214
Shannon et al., Over et al. v..... 99
Shaw et ux., Haas et al. v.....384
Shewalter, Whipple v.....114
Sidener et al. v. Haw Creek T. P. Co.....186
Sirp, Creamer v.....366
Smith v. Hess, Sheriff.....424
Smith, Louisville, New Albany and Chicago R. W. Co. v.....119
South et al. v. South et al.....221
Stapp, Reigelsberger v.....311
State v. Dupies.....233
State v. Hallowell.....376
State, Calvert v.....473
State, Dennis et al. v.....291
State, Dudley v.....312
State, Fowler et al. v.....507
State, Roy v.....417
State, Sage v.....141
State, ex rel. Ault, v. Long .....351
State, ex rel. Dunham, v. Roche, Adm'r, et al.....406
State, ex rel. Day, Patterson v....364
State, ex rel. Heitz, Kackley et al. v.....437
State, ex rel. McCollum, et al., Dewey et al. v.....173
State, ex rel. Rader, Caffyn, Auditor, v.....324
State, ex rel. Richardson, Benham v..... 82
State, for use of Busenburg, North River Bank v.....476
Summers et al., Brown v.....151
Swaynie v. Vess.....584
Swinney, Pittsburgh, Fort Wayne and Chicago R. W. Co. v.....399

Taylor v. Burk, Ex'r.....252
Teal et al., Burgett et al. v.....260
Thompson, Burns et al. v.....146
Thompson, Crawford et ux. v.....266
Tippy et al., Hays v.....102
Tomlinson, Mitchell v.....167
Town of Cicero et al. v. Williamson et al.....541
Traylor et al. v. Dykins, Auditor, et al.....229
Tully et al., Mescall v..... 96

Union School Tp., Barnes v.....301

Vess, Swaynie v.....584

Wallace et al. v. Lawyer et al....128
Wallace et al. v. Rowley, Adm'r..586
Walls et al. v. Baird.....429
Warren et al. v. Able et al., Adm'rs .....107
Watson, Adm'r, Keesling v.....578
Wayne Pike Co. v. Bosworth.....210
Weissinger, Adm'r, Ætna Ins. Co. v..... 297
Wells v. Morrison..... 51
Wells, Conner et al. v.....197
Whipple v. Shewalter.....114
Whitacre, Woollen v.....502
Williamson et al., Town of Cicero et al. v.....541
Woollen v. Whitacre.....502

# TABLE OF THE CASES

## CITED IN THIS VOLUME.


Abbott v. Zeigler, 9 Ind. 511.....322
Abdil v. Abdil, 33 Ind. 460.....464
Adams v. Adams, 51 N. H. 388 (12 Am. R. 134)..... 36
Adams v. Citizens State Bank, 70 Ind. 89.....284
Adams v. Stringer, 78 Ind. 175... 60
Ætna L. Ins. Co. v. Finch, 84 Ind. 301. .....501
Alcorn v. Morgan, 77 Ind. 184...422
Aldridge v. Dunn, 7 Blackf. 249 (41 Am. Dec. 224).....288
Alexander v. State, 48 Ind. 394..235
Allison v. Brookshire, 38 Tex. 199. .....394
Allen v. Anderson, 57 Ind. 388.48, 453
Allen v. Huntington, 16 Am. Dec. 702.....42, 425
Allen v. Jackson, L. R., 1 Ch. Div. 399. .....276
Allen v. Maclellan, 12 Pa. St. 328. 36
Allen v. Sharpe, 37 Ind. 67.....285
Allen v. Vestal, 60 Ind. 245.....467
Ames v. Lake Superior, etc., R. R. Co., 21 Minn. 241.....456
American Ins. Co. v. Avery, 60 Ind. 566.....387
Amory v. Meredith, 7 Allen, 397..226
Anderson v. Roberts, 18 Johns. 515. .....220
Andrews v. Brumfield, 32 Miss. 107. .....226
Anthony v. Cooley, 61 Ind. 323...486
Anthony v. Williams, 47 Ind. 565..486
Applegate v. Edwards, 45 Ind. 329.156
Applegate v. White, 79 Ind. 413.. 76
Argo v. Barthand, 80 Ind. 63..195, 542
Armstrong v. Gilchrist, 2 Johns. Cas. 424..... ..... .....527
Armstrong v. Murphy, 2 Ind. 601.434
Arnold v. Cord, 16 Ind. 177...56, 307
Atkisson v. Martin, 39 Ind. 242.. 49
Attorney General v. Steward, 20 N. J. Eq. 415.....293
Austen v. Boys, 2 DeGex & J. 626.. 19
Avery v. Akins, 74 Ind. 283.....514
Ayers v. Slifer, 89 Ind. 433 .....310
Aylesworth v. Brown, 31 Ind. 270.433

Backus v. Lebanon, 11 N. H. 19..456
Baer v. Martin, 8 Blackf. 317.....138
Bake v. Smiley, 84 Ind. 212.....109, 123, 255
Baker v. Frick, 45 Md. 337 (24 Am. R. 506) ..... .....137
Baker v. Gausin, 76 Ind. 317.....513
Baker v. Gordon, 23 Ind. 204..... 48
Baker v. Williams, 34 Ind. 547...599
Baldwin v. Bricker, 86 Ind. 221..170
Baldwin v. Fagan, 83 Ind. 447...172
Ball v. State, 26 Ind. 155.....295
Baltimore, etc., R. W. Co. v. New Albany, etc., R. R. Co., 53 Ind. 597. .....126
Bangs v. Smith, 98 Mass. 270.....226
Baragree v. Cronkhite, 33 Ind. 192. .....195
Barford v. Street, 16 Vesey Jr. 135. .....223
Barnes v. Doe, 4 Ind. 132.....517
Barry v. Viall, 12 R. I. 18.....551
Barton v. McWhinney, 85 Ind. 481. .....106, 555
Bates v. State, 31 Ind. 72.....235
Batty v. Fout, 54 Ind. 482.....464
Baugh v. Boles, 35 Ind. 524.....467
Baugh v. Boles, 66 Ind. 376.....156
Baxter v. Conolly, 1 Jac. & Walk. 556. ..... 19
Bayless v. Glenn, 72 Ind. 5.....423
Bean v. Coleman, 44 N. H. 539..137
Beavers v. State, 58 Ind. 530.....133
Bearss v. Montgomery, 46 Ind. 544. .....391
Beekman v. Saratoga, etc., R. R. Co., 3 Paige, 45..... .....456
Bell v. Davis, 75 Ind. 314.....412
Bell v. Golden, 27 Ind. 173.....320

Bell v. Mousset, 71 Ind. 347.....255
Bell v. State, 4 Gill (Md.) 301 ...429
Bellefontaine R.W. Co. v. Suman, 29 Ind. 40.....297, 520
Bescher v. State, 63 Ind. 302.....381
Berry v. Reed, 73 Ind. 235.....412
Bishop v. Redmond, 83 Ind. 157. 60
Bishop v. Remple, 11 Ohio St. 277.....228
Blagge v. Miles, 1 Story, 427.....224
Blair v. Davis, 9 Ind. 236.....312
Blasingame v. Blasingame, 24 Ind. 86.....196
Blizzard v. Riley, 83 Ind. 300.....284
Blood v. Nashua, etc., R. R. Corp., 2 Gray, 137..... 69
Bloomfield R. R. Co. v. Burress, 82 Ind. 83..... .....42, 425
Board, etc., v. Boynton, 30 Ind. 359.....540
Board, etc., v. Everett, 51 Ind. 543.....532
Board, etc., v. Hall, 70 Ind. 469..543, 329
Board, etc., v. Indianapolis, etc., R. W. Co., 89 Ind. 101.....327
Board, etc., v. Hicks, 2 Ind. 527.. 86
Board, etc., v. Pressley, 81 Ind. 361.....542
Board, etc., v. Ritter, 90 Ind. 362.532
Board, etc., v. Ruckman, 57 Ind. 96.....534
Board, etc., v. Shipley, 77 Ind. 553.....319
Board, etc., v. Shrader, 36 Ind. 87..532
Board, etc., v. Wheeldon, 15 Ind. 147.....540
Board, etc., v. White Water, etc., Co., 2 Ind. 162..... 69
Board, etc., v. Wood, 35 Ind. 70..532
Boesker v. Pickett, 81 Ind. 554...102
Bond v. Nave, 62 Ind. 505.....109
Bowen v. Fisher, 14 Ind. 104.....288
Bowen v. Pollard, 71 Ind. 177.....384
Bowman v. Mitchell, 79 Ind. 84..434
Boyd's Appeal, 38 Pa. St. 241..... 36
Boyers v. Crane, 1 W. Va. 176 ...551
Boynton v. Ball, 15 Rep. 783..... 25
Bradford v. Rice, 102 Mass. 472 . (3 Am. R. 483)..... 26
Bradstreet v. Everson, 72 Pa. St. 124 (13 Am. R. 625).....319
Bremmerman v. Jennings, 60 Ind. 175.....450
Brickley v. Heilbruner, 7 Ind. 488.194
Browning v. Merritt, 61 Ind. 425..450
Brown v. Budd, 2 Ind. 442.....217
Brown v. Buzan, 24 Ind. 194.....452
Brown v. Fodder, 81 Ind. 491.....535
Brown v. Fleischner, 4 Ore. 132..551
Brown v. Niles, 16 Ind. 385.....218
Brown v. Wyncoop, 2 Blackf. 230.468
Brown v. Yaryan, 74 Ind. 305....409
Brownlee v. Hare, 64 Ind. 311....255
Bruce v. State, 87 Ind. 450.....473
Brumble v. Brown, 71 N. C. 513..469
Bryan v. Moore, 81 Ind. 9.....542
Bucknall v. Story, 46 Cal. 589...534
Buffalo, etc., R. R. Co. v. Ferris, 26 Tex. 588.....456
Burns v. Barenfield, 84 Ind. 43...319
Burr v. Mendenhall, 49 Ind. 496..287
Busby v. Noland, 39 Ind. 234.....534
Butcher v. Stultz, 60 Ind. 170.125, 307
Butler v. Huestis, 68 Ill. 594 (23 Am. R. 589).....226
Butterfield v. Davenport, 84 Ind. 590..... ..... 94
Byrne v. Rising Sun Ins. Co., 20 Ind. 103.....323

Cain v. Goda, 84 Ind. 209.....42, 425
Campbell v. Johnson, 65 Mo. 439.227
Cardwill v. Gilmore, 86 Ind. 428..422
Caress v. Foster, 62 Ind. 145.....472
Carty v. Drew, 46 Vt. 346.....394
Case v. Johnson, 70 Ind. 31.....478
Case v. Fowler, 65 Ind. 29.....478
Caskey v. City of Greensburgh, 78 Ind. 233.....195, 542
Cassady v. American Ins. Co., 72 Ind. 95.....510
Catterlin v. City of Frankfort, 87 Ind. 45.....543
Cavanaugh v. Smith, 84 Ind. 380. 36, 195, 544
Chambers v. Butcher, 82 Ind. 508.166
Chambovet v. Cagney, 35 Sup. Ct. 474..... .....390
Chamness v. Chamness, 53 Ind. 301.....150
Chapin v. Board, etc., 21 Ind. 12..287
Charlestown School Tp. v. Hay, 74 Ind. 127.....323
Child v. Swain, 69 Ind. 230.....186
Chissum v. Dewes, 5 Russ. 29..... 19
Christy v. Smith, 80 Ind. 573..... 76
Church v. Cole, 36 Ind. 34.....304
City of Atchison v. Challiss, 9 Kan. 603.....577
City of Chicago v. Union, etc., Ass'n, 102 Ill. 379 (46 Am. R. 598)..... 69
City of Cincinnati v. White, 6 Pet. 431.....495
City of Columbus v. Dahn, 36 Ind. 330.....344, 495
City of Des Moines v. Layman, 21 Iowa, 153.....456
City of Evansville v. Decker, 84 Ind. 325 .....594

City of Evansville v. Evans, 37 Ind. 229.....495
City of Evansville v. Witter, 86 Ind. 414.....383
City of Indianapolis v. Indianapolis, etc., Co., 66 Ind. 396.....577
City of Indianapolis v. Kollman, 79 Ind. 504..... 76
City of Indianapolis v. McAvoy, 86 Ind. 587.....542
City of Indianapolis v. Scott, 72 Ind. 196 .....383
City of Lafayette v. Larson, 73 Ind. 367.....383
City of Logansport v. Justice, 74 Ind. 378 .....383
City of Logansport v. Puterbaugh, 46 Ind. 550.....491
City of Logansport v. Shirk, 88 Ind. 563.....135
City of Washington v. Small, 86 Ind. 462 .....383
Clark v. Carey, 63 Ind. 105.....450
Clark v. Holton, 57 Ind. 564.....562
Clark v. Middlesworth, 82 Ind. 240.....223
Clark v. Stephenson, 73 Ind. 489..516
Clarke v. State, 34 Ind. 436.....419
Clere's Case, 6 Co. 18.....225
Cline v. Guthrie, 42 Ind. 227.....399
Coan v. Clow, 83 Ind. 417 .....42, 425
Coan v. Grimes, 63 Ind. 21.....279
Cobble v. Tomlinson, 50 Ind. 550..396
Cole v. Kidd, 80 Ind. 563.....123
Colee v. State, 75 Ind. 511...143, 166
Collins v. Nave, 9 Ind. 209.....285
Cone v. City of Hartford, 28 Conn. 363. .....577
Commonwealth v. Lecky, 1 Watts, 1.....66, 429
Conner v. Board, etc., 57 Ind. 15..540
Cook v. Hopkins, 66 Ind. 208.....286
Cook v. Hull, 3 Pick. 269.....139
Coolman v. Fleming, 82 Ind. 117.542
Corbaley v. State, 81 Ind. 62.....408
Corey v. Swagger, 74 Ind. 211.....543
Corn Exchange Ins. Co. v. Babcock, 57 Barb. 222.....390
Coryell v. Stone, 62 Ind. 307.....384
Cox v. Arnsmann, 76 Ind. 210....310
Cox v. Bird, 65 Ind. 277.....182
Coyner v. Boyd, 55 Md. 166.....456
Crane v. Morris, 6 Pet. 598.....224
Crans v. Board, etc., 87 Ind. 162..156
Cravens v. Kitts, 64 Ind. 581.....515
Crocket v. Maguire, 10 Mo. 34...220
Cromie v. Board, etc., 71 Ind. 208.135
Croskey v. Chapman, 26 Ind. 333..598
Crossan v. May, 68 Ind. 242..... 94
Cross v. Carson, 8 Blackf. 138.....562
Crowfoot v. Zink, 30 Ind. 446.....288
Cruttwell v. Lye, 17 Vesey, 335.. 19
Cummins v. City of Seymour, 79 Ind. 491 (41 Am. R. 618)..69, 189, 594
Cummins v. Walden, 4 Blackf. 307. ..... 49
Cummings v. Barrett, 10 Cush. 186..139
Cutter v. Evans, 115 Mass. 27..... 25

Dale v. Kent, 58 Ind. 584.....166
Dale v. Thomas, 67 Ind. 570..182, 231
Dana v. Fielder, 12 N. Y. 40.....320
Davar v. Cardwell, 27 Ind. 478....323
Dean v. Phillips, 17 Ind. 406 .....109
Debolt v. Carter, 31 Ind. 355..182, 231
De Ford v. Urbain, 48 Ind. 219 ..263
De Haven v. Covalt, 83 Ind. 344..196
Deming v. State, 23 Ind. 416.....490
Dickinson v. Nelson, 4 Ind. 160..201
Dixon v. Duke, 85 Ind. 434.....423
Dodge v. Berry, 26 Hun, 246.....138
Doe v. Childress, 21 Wal. 642..... 25
Doe v. President, 7 Ind. 641 .....495
Doe v. Reagan, 5 Blackf. 217 (33 Am. Dec. 466).....513
Donnelly v. Simonton, 13 Minn. 301 .....434
Dorman v. State, 56 Ind. 454..... 22
Dormire v. Cogly, 8 Blackf. 177.. 26
Douch v. Rahner, 61 Ind. 64.101, 394
Dougherty v. Van Nostrand, 1 Hoffman Ch. 68..... 19
Douglay v. Davis, 45 Ind. 493....238
Douglass v. State, 72 Ind. 385.....166
Downey v. Hinchman, 25 Ind. 453. 8
Driftwood Valley T. P. Co. v. Board, etc., 72 Ind. 226.....577
Drinkout v. Eagle Mach. Works, 90 Ind. 423.....594
Dronberger v. Reed, 11 Ind. 420.. 48, 453
Drusadow v. Wilde, 63 Pa. St. 170.226
Dufour v. Kious, 91 Ind. 409.....474
Dumont v. Dufour, 27 Ind. 263..472
Dunbar v. Baker, 104 Mass. 211.. 25
Dunn v. Dunn, 82 Ind. 42 ..... 97
Dunning v. Vandusen, 47 Ind. 423 (17 Am. R. 709).....224
Durland v. Pitcairn, 51 Ind. 426..582
Durham v. Fechheimer, 67 Ind. 35.....186
Durham v. Bischof, 47 Ind. 211..182

Earl v. De Hart, 1 Beasley, 280..138
Earl v. Matheney, 60 Ind. 202....195
Earle v. Earle, 91 Ind. 27.....546
Eberwine v. State, 97 Ind. 266....387
Edgerton v. Huff, 26 Ind. 35.....137
Eddy v. Davidson, 42 Vt. 56..... 8

Edson v. Edson, 108 Mass. 590 (11 Am. R. 393)..... 36
Edwards v. Stevens, 3 Allen, 315..390
Effinger v. State, 47 Ind. 235.....419
Eggers v. Eggers, 57 Ind. 461.....145
Elliot's Appeal, 60 Pa. St. 161.... 19
Ellis v. Kenyon, 25 Ind. 134.....517
Emans v. Turnbull, 3 Am. Dec. 427. .....137
Emily v. Harding, 53 Ind. 102...304
Epler v. Niman, 5 Ind. 459.....342
Esdaile v. La Nauze, 1 Younge & C., 394.....285
Evans v. Ashby, 22 Ind. 15...42, 425
Evans v. Feeny, 81 Ind. 532 .....289
Evans v. Nealis, 87 Ind. 262..... 48
Evans v. White, 53 Ind. 1.....110
Evansville, etc., R.R. Co. v. Baum, 26 Ind. 70.....233
Evansville, etc., R. R. Co. v. City of Evansville, 15 Ind. 395.....560
Evansville, etc., R. R. Co. v. Miller, 30 Ind. 209.....48, 454
Ewing v. Ewing, 24 Ind. 468..... 35
Ewing v. Patterson, 35 Ind. 326..467
Ex Parte Bond, 9 S. C. 80 (30 Am. R. 20).....429
Ex Parte Farnham, 3 Col. 545...429
Ex Parte Kaufman, 73 Mo. 588..429
Ex Parte Murray, 43 Cal. 455....429
Ex Parte Maxwell, 11 Nev. 428..429
Ex Parte McCullough, 35 Cal. 97..429
Ex Parte Parks, 93 U. S. 18.....429
Ex Parte Post, 47 Ind. 142.....380
Ex Parte Ruthven, 17 Mo. 541...429
Ex Parte Shaw, 7 Ohio St. 81.....429
Ex Parte Twohig, 13 Nev. 302...429
Ex Parte Watkins, 3 Peters, 193..429

Faxon v. Baxter, 11 Cush. 35..... 25
Feaster v. Woodfill, 23 Ind. 493..512
Featherston v. Small, 77 Ind. 143.543
Fell v. Muller, 78 Ind. 507..... 20
Fensler v. Prather, 43 Ind. 119... 62
Ferguson v. State, 90 Ind. 38.....597
Fidelity Ins. Co.'s Appeal, 93 Pa. St. 242..... 40
Field v. Schieffelin, 7 Johns. Ch. 250 .....51, 470
Firestone v. Firestone, 78 Ind. 534. .....133
Fisher v. Evansville, etc., R. R. Co., 7 Ind. 407.....560
Fisher v. Foss, 30 Me. 459..... 25
Fisher v. Hobbs, 42 Ind. 276.....342
Fisher v. Wilson, 18 Ind. 133..... 98
Fleming v. Clark, 12 Allen, 191...429
Fletcher v. Holmes, 25 Ind. 458..470
Flory v. Wilson, 83 Ind. 391.....422
Floyd v. Maddux, 68 Ind. 124....519
Fort Wayne, etc., R. R. Co. v. Husselman, 65 Ind. 73.....122
Fox v. Ray, 56 Ind. 423.....464
Frank v. Kessler, 30 Ind. 8.....519
Franklin L. Ins. Co. v. Hazzard, 41 Ind. 116 (13 Am. R. 313)...207
Franklin L. Ins. Co. v. Sefton, 53 Ind. 380 .....207
Frazee v. McChord, 1 Ind. 224...597
Frenchr v. Turner, 15 Ind. 59.....153
Funk v. Eggleston, 92 Ill. 515 (34 Am. R. 136).....226

Gage v. Clark, 22 Ind. 163..... 34
Gall v. Fryberger, 75 Ind. 98..42, 425
Gardner v. Haney, 86 Ind. 17....446
Gavin v. Shuman, 23 Ind. 32.....517
Gentry v. Allison, 20 Ind. 481.....201
Ghormley v. Young, 71 Ind. 62..513
Gibbs v. Blanchard, 15 Mich. 292. 6
Glenn v. State, 46 Ind. 368.....506
Glidewell v. Snyder, 72 Ind. 528..409
Good v. Fogg, 61 Ill. 449.....394
Goddard v. O'Brien, L. R. 9 Q. B. 37. ..... 62
Godfrey v. City of Alton, 12 Ill. 29.495
Godfrey v. Godfrey, 17 Ind. 6.....515
Goodtitle v. Alker, 1 Burr. 133...137
Goodwin v. Smith, 72 Ind. 113 (37 Am. R. 144).....67, 422
Gould v. Hayden, 63 Ind. 443.... 26
Gouverneur v. Elmendorff, 4 Johns. Ch. 357..... 51
Graeter v. Williams, 55 Ind. 461..123, 150
Graham v. Graham, 55 Ind. 23..279, 304
Grass v. Hess, 37 Ind. 193.....194
Greenman v. Cohee, 61 Ind. 201..523
Greensburgh, etc., T. P. Co. v. Sidener, 40 Ind. 424.....279
Greer v. State, 53 Ind. 420.....525
Gregory v. Purdue, 32 Ind. 453..363
Griffin v. Coffey, 9 B. Mon. 452...310
Groesch v. State, 42 Ind. 547.....452
Groves v. Ruby, 24 Ind. 418.....448
Grusenmeyer v. City of Logansport, 76 Ind. 549.....542
Gwaltney v. Wheeler, 26 Ind. 415.310
Gwynn v. Homan, 15 Ind. 201...495

Haag v. Board, etc., 60 Ind. 511 (28 Am. R. 654) .....345
Hall v. Preble, 68 Me. 100.....227
Halstead v. Board, etc., 56 Ind. 363.....446, 581
Ham v. Salem, 100 Mass. 350.....139
Hamilton v. Burch, 28 Ind. 233..133
Hamilton v. Cummings, 1 Johns. Ch. 517..... 93

Hamilton v. Huntley, 78 Ind. 521 (41 Am. R. 593) .....464
Hamilton v. State, 36 Ind. 280 (10 Am. R. 22) .....513
Hamlyn v. Nesbit, 37 Ind. 284....255
Hampson v. Fall, 64 Ind. 382.....304
Hanna v. Aebker, 84 Ind. 411.....466
Hanna v. Shields, 34 Ind. 84 .....263
Hannah v. Dorrell, 73 Ind. 465...133
Harbison v. Bank, etc., 28 Ind. 133. .....172
Hardy v. Overman, 36 Ind. 549..109
Harris v. Boone, 69 Ind. 300..... 56
Harrison v. Phœnix Mutual L. Ins. Co., 83 Ind. 575... .....501
Hart v. Trustees, etc., 15 Ind. 226.342
Hasbrouck v. City of Milwaukee, 21 Wis. 217 .....524
Hathorn v. Germania Ins. Co., 55 Barb. 28 .....299
Hatton v. Jones, 78 Ind. 466..... 60
Hawkins v. Hawkins, 28 Ind. 66..545
Hawley v. Smith, 45 Ind. 183.....244
Hayden v. Smith, 12 Met. 511.....434
Hays v. Morgan, 87 Ind. 231.....133
Hays v. State, 8 Ind. 425.....343, 496
Hays v Tippy, 91 Ind. 102.....454
Haymond v. Saucer, 84 Ind. 3...464
Hayward v. Davidson, 41 Ind.212.345
Hayworth v. Worthington, 5 Blackf. 361 (35 Am. Dec. 126)..125
Heady v. State, 60 Ind. 316.....381
Heagy v. Black, 90 Ind. 534.....543
Heath v. West, 68 Ind. 548.....320
Heavenridge v. Mondy,34 Ind.28.232
Hedrick v. Hedrick, 55 Ind. 78...543
Henderson v. Dickey, 50 Mo. 161.527
Henderson v. McDonald, 84 Ind. 149..... .....601
Hepburn v. Dunlop, 1 Wheat. 179.527
Hetfield v. Dow, 27 N. J. L. 440. 8
Heyneman v. Blake, 19 Cal. 579...456
Heyward v. Mayor, 7 N. Y. 314..559
Hewitt v. Powers, 84 Ind. 295.....264
Higgins v. Crawfurd, 2 Vesey, Jr., 571.....379
Higgins v. Kusterer, 41 Mich. 318 (32 Am. R. 160) .....140
Hill v. State, 4 Ind. 112..... 83
Hill v. Sutton, 47 Ind. 592 .....582
Hilligass v. Bender, 78 Ind. 225..321
Hines v. Driver, 72 Ind. 125.....150
Hodgson v. Jeffries, 52 Ind. 334..256
Hoffman v. Hoffman, 15 Ind. 278. 34
Hoke v. Henderson, 3 Dev. 12.....220
Holbrook v. Foss, 27 Maine, 441. 25
Holdane v. Trustees, 21 N.Y.474..495
Holloway v. Porter, 46 Ind. 62... 94
Holman v. Elliott, 65 Ind. 78.....468
Hoover v. State, 56 Md. 584 ...:...419
Horner v. Chicago, etc., R. W. Co., 38 Wis. 165 .....174, 562
Horner v. Doe, 1 Ind. 130...193, 544
Houck v. Wachter, 34 Md. 265.... 69
Houk v.Barthold, 73 Ind. 21..311, 542
House v. McKinney, 54 Ind. 240..581
Howard v. Windham Co., etc., Bank, 40 Vt. 597 .....599
Howe v. Yopst, 20 Ind. 409.....513
Howell v. Harvey, 5 Ark. 270....167
Hubbard v. Harrison, 38 Ind.323..150
Hubbard v. Hubbard, 16 Ind. 25..378
Hubble v. Osborne, 31 Ind. 249...466
Hudson v. State, 54 Ind. 378.....380
Hugart v. Lenburg, 45 Ind. 498..310
Hughes v. Heiser, 1 Binn. 463.... 69
Hume v. Conduitt, 76 Ind. 598...195, 545
Hunt v. Beeson, 18 Ind. 380.....562
Hunt v. Standart, 15 Ind. 33.....450
Hunter v. Leavitt, 36 Ind. 141...323
Huston v. Neil, 41 Ind. 504.....396
Huston v. Roosa, 43 Ind. 517...92, 285
Huston v. Schindler, 46 Ind. 38.. 92, 285
Hymes v. Aydelott, 26 Ind. 431... 48

Indiana, etc., Co. v. Millican, 87 Ind. 87 .....384
Indiana, etc., Co. v. State, 53 Ind. 575. .....320
Indianapolis, etc., R. W. Co. v. Hood, 66 Ind. 580.....562
Indianapolis, etc., R. R. Co. v. McLin, 82 Ind. 435 .....433
Indianapolis, etc., R. R. Co. v. Moore, 16 Ind. 43.....290
Indianapolis, etc., R. W. Co. v. Risley, 50 Ind. 60 .....125
Indianapolis, etc., R. R. Co. v. Ross, 47 Ind. 25 .....348
Indianapolis, etc., R. R. Co. v. Stephens, 28 Ind. 429 .....290
Indianapolis, etc., R. R. Co. v. Stout, 53 Ind. 143.....121
Indianapolis, etc., R. R. Co. v. Taffe, 11 Ind. 458.....196
Ingel v. Scott, 86 Ind. 518.....197
Ingersoll v. Kirby, Walker Ch. 27.491
Ingham v. White, 4 Allen, 412...390
In re Coffeen, 38 Mich. 311 .....429
In re Gallison, 5 Nat. Bank. Reg. 353. ..... 25
In re Lower Chatham, 35 N. J. L. 497. .....456
In re Mansfield, 6 Nat. Bank. Reg. 388. ..... 26
In re Teape's Trusts, 6 Moak Eng. R. 801.....225
Irwin v. Ivers, 7 Ind. 308 ..... 97

Jackson v. Smiley, 18 Ind. 247....341
Jarboe v. Severin, 85 Ind. 496..... 98
Jarvis v. Banta, 83 Ind. 528..207, 421
Jarvis v. Dean, 3 Bing. 447.....342
Jeffersonville, etc., R. R. Co. v. Breevort, 30 Ind. 324 .....297
Jeffersonville, etc., R. R. Co. v. Cox, 37 Ind. 325.....328
Jeffersonville, etc., R. R. Co. v. Lyon, 72 Ind. 107.....297
Jeffries v. Sherburn, 21 Ind. 112..201
Jenkins v. Long, 23 Ind. 460.....133
Jenks v. Lima Tp., 17 Ind. 326...534
Jenks v. State, 39 Ind. 1 .....474
Jennings v. Kee, 5 Ind. 257.....408
Johnson v. Britton, 23 Ind. 105..285
Johnson v. Coleman, 23 Wis. 452.. 36
Johnson v. Smith, 64 Ind. 275.....326
Johnson v. Wendle, 3 Scott, 608..285
Johnston v. Glancy, 4 Blackf. 94 (28 Am. Dec. 45) .....304
Johnston v. Griest, 85 Ind. 503... 99
Johnston, etc., Co. v. Bartley, 81 Ind. 406 ..... 99
Jones v. Jones, 81 Ind. 292.....372
Jones v. Jones, 91 Ind. 72.....476
Jones v. Kokomo, etc., Ass'n, 77 Ind. 340 .....102
Jones v. Wood, 16 Pa. St. 25 .....225
Judy v. Gilbert, 77 Ind. 96 (40 Am. R. 289)..... 99
Julien v. Woodsmall, 82 Ind. 568..137

Kane v. Bloodgood, 7 Johns. Ch. 90.....379
Kane v. State, 71 Ind. 559.....512
Keepfer v. Force, 86 Ind. 81.....376
Keiser v. State, 78 Ind. 430.....314
Keith v. Champer, 69 Ind. 477...448
Kelley v. McFadden, 80 Ind. 536.102, 394
Kelso v. Tabor, 52 Barb. 125.....390
Kelso v. Wolf, 70 Ind. 105.....519
Kemp v. Mackrell, 3 Atk. 812....470
Kendall v. Post, 8 Oregon, 141...456
Kennedy v. State, 53 Ind. 542....512
Kent v. Downing, 44 Ga. 116..... 25
Kerrigan v. Rautigan, 43 Conn. 17..... 599
Kidwell v. State, 45 Ind. 27.....380
Killian v. Eigenmann, 57 Ind. 480..256
Kingan v. Gibson, 33 Ind. 53..... 56
Kline v. Spark, 56 Ind. 296.....448
Klingensmith v. Reed, 31 Ind. 389. 50
Knight v. McDonald, 37 Ind. 463.585
Kretsch v. Helm, 45 Ind. 438.....491
Krohn v. Templin, 2 Ind. 146.....312
Krug v. Davis, 85 Ind. 309 ...42, 425
Kuntz v. Kinney, 33 Wis. 503.....394
Kyle v. Kyle, 55 Ind. 387.....545

Lafayette Ins. Co. v. French, 18 How. 404..... 43
Lafayette, etc., R. R. Co. v. Geiger, 34 Ind. 185.....452
Lake Erie, etc., R. R. Co. v. Heath, 9 Ind. 558.....48, 453
Lamborn v. County Comm'rs, 97 U. S. 181.....533
Lancaster v. Gould, 46 Ind. 397..523
Lane v. Albright, 49 Ind. 275.....244
Lansing v. Smith, 8 Cow. 146..... 69
Law v. Smith, 4 Ind., 56 .....468
Leach v. Leach, 4 Ind. 628.....560
Leach v. Leach, 10 Ind. 271.....562
Leach v. Prebster, 39 Ind. 492....143
Leach v. Rhodes, 49 Ind. 291.....582
Lewis v. Lewis, 30 Ind. 257.....150
Liberty Tp. Draining Ass'n v. Watkins, 72 Ind. 459.....387
Lindsey v. Lindsey, 45 Ind. 552..560
Little v. Thompson, 24 Ind. 146..543
Livingston v. Mayor, 8 Wend. 85..456
Llewellyn v. Rutherford, 13 Moak Eng. Rep. 328..... ..... 19
Lockwood v. Quackenbush, 83 N. Y. 607..... 99
Logan v. Logan, 77 Ind. 558.....388
Lord v. Parker, 3 Allen, 127.....390
Loshbaugh v. Birdsell, 90 Ind. 466. .....161
Louisville, etc., R. W. Co. v. Ehlert, 87 Ind. 139.....113
Louisville, etc., R. W. Co. v. Kious, 82 Ind. 357.....290
Louisville, etc., R. R. Co. v. State, 25 Ind. 177. ..... 86
Love v. Blair, 72 Ind. 281.....397
Love v. Miller, 53 Ind. 294 (21 Am. R. 192).....245
Lovely v. Speisshoffer, 85 Ind. 454. .....585
Lowder v. Lowder, 58 Ind. 538...150
Lumpkin v. Justice, 1 Ind. 557...523
Lytle v. Lytle, 37 Ind. 281.....464

Mace v. Jackson, 38 Ind. 162.....320
Mackay v. N. Y. C. R. R. Co., 35 N. Y. 75..... .....122
Mackenzie v. Board, etc., 72 Ind. 189. ..... ..... .....233
Maddux v. Watkins, 88 Ind. 74..218
Mahon v. Sawyer, 18 Ind. 73.....399
Makepeace v. Lukens, 27 Ind. 435.133
Mallett v. Page, 8 Ind. 364.....600
Mansur v. State, 60 Ind. 357.....344
Marquess v. La Baw, 82 Ind. 550.239, 409
Marshall v. Gill, 77 Ind. 402.....195
Marshall v. Peters, 12 How. Pr. 218. .....139

Martin v. Howell, 8 Ind. 501.....312
Martin v. Martin, 16 B. Mon. 8...310
Mason v. Hill, 5 B. & Ad. 1 .....138
Masonic, etc., Ass'n v. Beck, 77 Ind. 203 (40 Am. R. 295)...87, 324
Matthews v. Milton, 4 Yerger, 575..... 8
Mauck v. State, 66 Ind. 177..344, 496
Maxwell v. Campbell, 45 Ind. 360.....304
Maxwell v. McAtee, 9 B. Mon. 20.....137
McAlpine v. Sweitser, 76 Ind. 78.545
McAroy v. Wright, 25 Ind. 22.....390
McBroom v. Corporation of Lebanon, 31 Ind. 268.....232
McCallister v. Mount, 73 Ind. 559..524
McCarnan v. Cochran, 57 Ind. 166.....332
McCauley v. Holtz, 162 Ind. 205..288
McCloskey v. Indianapolis, etc., Union, 67 Ind. 86 (33 Am. R. 76)..... 22
McCormack v. First Nat. Bank, 53 Ind. 466.....443, 545
McCowan v. Whitesides, 31 Ind. 235..... 69
McCoy v. Payne, 68 Ind. 327.....109
McCreery v. Parsley, 1 Marsh. 114.....220
McGowin v. Remington, 12 Pa. St. 56.....527
McJunkin v. McJunkin, 3 Ind. 30..... 33
McKinney v. Monongahela Nav. Co., 2 Harris, 65.....456
McMahan v. Newcomer, 82 Ind. 565.....515
McMaster v. President, etc., Ins. Co., 55 N. Y. 222 (14 Am. R. 239).....150
McOuat v. Cathcart, 84 Ind. 567..310
McQuigg v. McQuigg, 13 Ind. 294. 33
McRee v. McRee, 34 Ala. 165.....491
McWhinney v. Brinker, 64 Ind. 360.....126
Mendenhall v. Cluggish, 84 Ind. 94.....486
Menifee v. Clark, 35 Ind. 304.....464
Merrill v. Abbott, 62 Ind. 549....492
Merritt v. Pearson, 76 Ind. 44....516
Miller v. Noble, 86 Ind. 527 .....514
Miller v. Porter, 71 Ind. 521.....543
Miller v. Voss, 40 Ind. 307 .....594
Mulligan v. Poole, 35 Ind. 64.....515
Millikin v. Town of Bloomington, 49 Ind. 62.....446
Million v. Board, etc., 89 Ind. 5..178
Millner v. Elgin, 64 Ind. 197 (31 Am. R. 121).....504
Mill River, etc., Co. v. Smith, 34 Conn. 462.....139
Milner v. Hyland, 77 Ind. 458...463
Miner v. Rogers, 40 Conn. 512 (16 Am. R. 69).....599
Mitchell v. Chambers, 55 Ind. 289.....122
Mitchell v. Gray, 18 Ind. 123.....544
Mobley v. State, 83 Ind. 92..... 60
Moberry v. City of Jeffersonville, 38 Ind. 198.....491
Modisett v. Johnson, 2 Blackf. 431.....201
Monroe v. Paddock, 75 Ind. 422..312
Moon v. Baum, 58 Ind. 194..... 39
Moore v. Cline, 61 Ind. 113.....486
Moore v. State, 65 Ind. 213.....235
Moreland v. Lemasters, 4 Blackf. 383 .....304
Morgan v. Railroad Co., 96 U. S. 716.....494
Morris v. Stern, 80 Ind. 227..193, 264
Morton G. R. Co. v. Wysong, 51 Ind. 4 .....213
Mullen v. Board, etc., 9 Ind. 502..540
Mullikin v. City of Bloomington, 72 Ind. 161.....542
Muncey v. Joest, 74 Ind. 409.....542
Munson v. Berdan, 35 N. J. Eq. 376.....226
Murphy v. Blair, 12 Ind. 184.379, 472
Murphy v. City of Indianapolis, 83 Ind. 76.....383
Murray v. Coster, 20 Johns. 576..379
Musselman's Appeal, 62 Pa. St. 81 (1 Am. R. 382)..... 19
Musselman v. Cravens, 47 Ind. 1..232
Musselman v. Kent, 33 Ind. 452..200
Mustard v. Hoppess, 69 Ind. 324..193
Myers v. State, 45 Ind. 160.....408
Myer v. Whitaker, 5 Abb. N. C. 172.....139

Nave v. Hadley, 74 Ind. 155.....231
Nealis v. Dicks, 72 Ind. 374..... 35
Nelson v. Fleming, 56 Ind. 310.. 135
Nelson v. Vorce, 55 Ind. 455..504, 525
New v. Wamback, 42 Ind. 456...391
Newcastle, etc., R. R. Co. v. Peru, etc., R. R. Co., 3 Ind. 464.....559
Newcome v. Wiggins, 78 Ind. 306..182
Newton v. Marsden, 2 J. & H. 356.....275
Nicholas v. Nicholas, 25 N. J. Eq. 60..... 39
Noble v. Hines, 72 Ind. 12.....467
Norristown, etc., T. P. Co. v. Burket, 26 Ind. 53.....48, 456
Nowell v. Roake, 2 Bing. 503.....225
Nye v. Lewis, 65 Ind. 326..... 76

O'Brian v. State, 14 Ind. 469..... 83
O'Dailey v. Morris, 31 Ind. 111...387
Oelrichs v. Spain, 15 Wal. 211...527
Ogle v. Dill, 61 Ind. 438.....256
Ohio, etc., R. W. Co. v. Hardy, 64 Ind. 454.....322
Ohio, etc., R. W. Co. v. Miller, 46 Ind. 215.....520
Ohio, etc., R. R. Co. v. Nickless, 71 Ind. 271.....286
O'Linda v. Lothrop, 21 Pick. 292.137
Olleman v. Reagan, 28 Ind. 109..109
Oppenheim v. Pittsburgh, etc., R. W. Co., 85 Ind. 471.....545
Orr v. O'Brien, 55 Tex. 149.....228
Orth v. Jennings, 8 Blackf. 420...201
Over v. Shannon, 75 Ind. 352....102, 463, 532
Overshiner v. Jones, 66 Ind. 452..486
Owens v. Lewis, 46 Ind. 488 (15 Am. R. 295)..... ..... 97

Packard v. Mendenhall, 42 Ind. 598.....195, 544
Patterson v. Doe, 8 Blackf. 237 ..304
Paine v. Woods, 108 Mass. 160...138
Palmer v. Glover, 73 Ind. 529.....412
Pancake v. State, 81 Ind. 93.....418
Parks v. Evansville, etc., R. R. Co., 23 Ind. 567.....323
Parks v. Barrowman, 83 Ind. 561.387
Parker v. Ash, 1 Vern. 256.....379
Parsons v. Winslow, 6 Mass. 169 (4 Am. Dec. 107).....274
Paul v. Connersville, etc., R. R. Co., 51 Ind. 527.....304
Pearson v. East, 36 Ind. 27 ..... 97
Peery v. Greensburgh, etc., T. P. Co., 43 Ind. 321.....196
Pence v. Croan, 51 Ind. 336 .....467
Pennington v. Clifton, 11 Ind. 162. 200, 466
Pennoyer v. Neff, 95 U. S. 714 ... 43
Pennsylvania R. R. Co. v. Lutheran Congregation, 53 Pa. St. 445. .....455
People v. Anderson, 44 Cal. 65...150
People v. Ball, 42 Barb. 324.....418
People v. Potter, 47 N. Y. 375...359
People's Ice Co. v. Steamer "Excelsior," 44 Mich. 229 (38 Am. R. 246)..... .....140
Perkins v. Perkins, 7 Lansing, 19..390
Perkins v. Bragg, 29 Ind. 507.....393
Perry v. State, 41 Tex. 488.....429
Petition of Crandall, 34 Wis. 177..429
Pettit v. Braden, 55 Ind. 201..... 8
Petty v. Board, etc., 70 Ind. 290..399
Pfeifer v. Snyder, 72 Ind. 78.....467
Phelan v. Boylan, 25 Wis. 679...527
Piel v. Brayer, 30 Ind. 332..... ..363
Pierce v. Dart, 7 Cow. 609..... 69
Pierce v. Osman, 79 Ind. 259.....387
Pike v. McDonald, 32 Me. 418... 25
Piper v. Connersville, etc., T. P. Co., 12 Ind. 400.....456
Pittsburgh, etc., R. W. Co. v. Culver, 60 Ind. 469.....113
Pittsburgh, etc., R. W. Co. v. Hixon, 79 Ind. 111.....113
Pittsburgh, etc., R. W. Co. v. Hunt, 71 Ind. 229.....239
Pittsburgh, etc., R. W. Co. v. Town of Elwood, 79 Ind. 306...412
Pitzer v. Indianapolis, etc., R. W. Co., 80 Ind. 569.....422, 474
Plaster v. Burger, 5 Ind. 232.....310
Platner v. Patchin, 19 Wis. 333..279
Platter v. City of Seymour, 86 Ind. 323..... 99
Plummer v. Lord, 5 Allen, 460...390
Plummer v. Lord, 7 Allen, 481...390
Pollard v. Wegener, 13 Wis. 569. 43
Pollen v. Le Roy, 30 N. Y. 549...320
Porter v. Daugherty, 43 Ind. 37.. 94
Porter v. Holloway, 43 Ind. 35... 94
Porter v. Stout, 73 Ind. 3.....543
Powell v. Bunger, 79 Ind. 468....535
Prather v. Zulauf, 38 Ind. 155...399
Pratt v. State, 56 Ind. 179.....504
Pressler v. Turner, 57 Ind. 56..42, 425
Price v. Huey, 22 Ind. 18.....446
Proctor v. Walker, 12 Ind. 660 .. 38
Prudden v. Lindsey, 29 N. J. Eq. 615. .....345
Puett v. Beard, 86 Ind. 172 (44 Am. R. 280).....532
Putney v. Hardy, 99 Mass. 5..... 19

Quick v. Goodwin, 19 Ind. 438... 34

Railsback v. Greve, 58 Ind. 72...582
Rawson v. Inhabitants, 7 Allen, 125. .....562
Ray v. Wight, 119 Mass. 426..... 25
Ray v. Indianapolis Ins. Co., 39 Ind. 290.....233
Raymond v. Simonson, 4 Blackf. 77 .....380
Ready v. State, 62 Ind. 1.....235
Reed v. Smith, 14 Ala. 380.....220
Reilly v. Cavanaugh, 29 Ind. 435..320
Rex v. Leake, 5 B. & Ad. 469.....345
Reynolds v. State, 61 Ind. 392....354
Reynolds v. Blue, 47 Ala. 711.....551
Rice v. Loomis, 28 Ind. 399..... 56
Rich v. City of Chicago, 59 Ill. 286. ..... ..... .....456
Richards v. Millard, 56 N. Y. 574. .....320

Richardson v. N. Y. C. R. R. Co., 45 N. Y. 846 .....122
Ricketts v. Harvey, 78 Ind. 152..580
Rickets v. Spraker, 77 Ind. 371..193, 542
Rindge v. Rindge, 22 Ind. 31..... 34
Rinker v. Rinker, 20 Ind. 185....599
Ritenour v. Mathews, 34 Ind. 279.399
Robards v. Marley, 80 Ind. 185..263
Roll v. City of Indianapolis, 52 Ind. 547.....594
Rominger v. Keyes, 73 Ind. 375.. 94
Rose v. Miles, 4 M. & S. 101..... 69
Rose v. Park Bank, 20 Ind. 94...450
Ross v. Thompson, 78 Ind. 90..69, 496
Rowan v. Town of Portland, 8 B. Monroe, 232.....495
Rowe v. Arnold, 39 Ind. 24.....523
Ruff v. Ruff, 85 Ind. 431.....435
Ryman v. Crawford, 86 Ind. 262..422

Salisbury v. Howe, 87 N. Y. 128. 99
Sample v. Cochran, 84 Ind. 594 ..598
Sampson v. Clark, 2 Cush. 173.... 25
Sanders v. Farrell, 83 Ind. 28.....166
Sanders v. Muegge, 91 Ind. 214...466
Sanders v. State, 85 Ind. 318 (44 Am. R. 29)..... 36
Sanger v. Dun, 47 Wis. 615.....319
Schenck v. Butsch, 32 Ind. 338...256
Schmidt v. State, 78 Ind. 41.....235
School Town of Princeton v. Gebhart, 61 Ind. 187..... 86
Schoonover v. Reed, 65 Ind. 313.. 76
Schwarm v. Osborn, 59 Ind. 245..388
Scott v. Crawford, 12 Ind. 410.....288
Scott v. State, 89 Ind. 368 .....476
Scott v. Stipe. 12 Ind. 74.....562
Scotten v. State, 51 Ind. 52.....490
Scrope's Case, 10 Co. 143.....225
Sedgwick v. Tucker, 90 Ind. 271..510
Seeley v. Brush, 35 Conn. 419.....140
Seeley v. Gwillim, 40 Conn. 106..394
Seward v. Clark, 67 Ind. 289.....255
Shaefer v. Gates, 2 B. Mon. 453.. 43
Sharp v. Gutcher, 74 Ind. 357.....126
Shaw v. Barnhart, 17 Ind. 183...263
Sheets v. Selden, 2 Wal. 177.....136
Sheldon v. Houghton, 5 Blatch. C. C. 285..... 19
Sherman v. Sherman, 3 Ind. 337..434
Shook v. State, 53 Ind. 403 .....380
Sibbitt v. Styker, 62 Ind. 41 .....279
Sibree v. Tripp, 15 M. & W. 23.. 62
Sidener v. Davis, 69 Ind. 336 .....166
Sidener v. Norristown, etc., T. P. Co., 23 Ind. 623.....496
Sieveking v. Litzler, 31 Ind. 13 .. 19
Sims v. City of Frankfort, 79 Ind. 446.....195, 346
Singer v. Singer, 41 Barb. 139..... 36
Sithin v. Board, etc., 66 Ind. 109..446
Skillen v. Wallace, 36 Ind. 319...321
Sloan v. Whiteman, 6 Ind. 434...238
Smedes v. Elmendorf, 3 Johns. 185. .....319
Smith v. Calloway, 7 Blackf. 86..379
Smith v. Harris, 76 Ind. 104.....397
Smith v. Hess, 91 Ind. 424..... 42
Smith v. Kyler, 74 Ind. 575.....585
Smith v. Johnson, 69 Ind. 55.....326
Smith v. Ryan, 83 Ind. 152.....284
Smith v. Smith, 3 Phila. 489..... 40
Snowden v. Wilas, 19 Ind. 10.....138
Souder's Appeal, 57 Pa. St. 498...527
Southard v. Pope, 9 B. Mon. 261..309
Sowards v. Prichett, 37 Ill. 517...491
Spicer v. Hockman, 72 Ind. 120..380
Squier v. Gould. 14 Wend. 159... 19
Spath v. Hankins, 55 Ind. 155...310
Staley v. Jameson, 46 Ind. 159 (15 Am. R. 285).....319
Stanley v. Sutherland, 54 Ind.339.524
Starrett v. Burkhalter, 86 Ind.439.506
State v. Bailey, 16 Ind. 46.....556
State v. Bieler, 87 Ind. 320.....354
State v. Board, etc., 45 Ind. 501.. 86
State v. Bottorff, 82 Ind. 538..... 50
State v. Brewer, 64 Ind. 131.....161
State v. Clark, 16 Ind. 97.....409
State v. Drake, 64 N. C. 589 .....419
State v. Eskridge, 1 Swan, 413.....419
State v. Hill, 10 Ind. 219.....342, 496
State v. Howard, 80 Ind. 466.....535
State v. Hudson, 37 Ind. 198.....195
State v. Land, 42 Ind. 311.....419
State v. Maddox, 74 Ind. 105.....235
State v. Maddox, 85 Ind. 585.....235
State v. Manley, 15 Ind. 8.....393
State v. Parish, 83 Ind. 223.....131
State v. Pottmeyer, 33 Ind. 402 (5 Am. R. 224).....137
State v. Record, 80 Ind. 348.....412
State v. Sanders, 62 Ind. 562.....409
State v. Shattuck, 45 N. H. 205..429
State v. Sheriff, 24 Minn. 87.....429
State v. Thompson, 62 Ind. 367...510
State v. Welch, 83 Ind. 308.....235
State v. Wheadon, 39 Ind. 520.....327
Steadman v. Lee, 61 Ga. 58..... 24
Steeple v. Downing, 60 Ind. 478..517
Stehman v. Crull, 26 Ind. 436.....379
Steinmetz v. Signer, 23 Ind. 386..491
Stephenson v. Arnold, 89 Ind. 426. 98
Stevens v. Hurt, 17 Ind. 141.....289
Stewart v. Rankin, 39 Ind. 161...166
Stewart v. Weed, 11 Ind. 92.....599
Stillwell v. Bertrand, 22 Ark. 375.469
Stilwell v. Knapper, 69 Ind. 558 (35 Am. R. 240).....274

Stoddard v. Johnson, 75 Ind. 20..542
Storm v. Manchaug Co., 13 Allen, 10.....138
Stout v. State, 90 Ind. 1.....146
Stout v. Woods, 79 Ind. 108.....545
Stroup v. State, 70 Ind. 495.....380
Stumph v. Pfeiffer, 58 Ind. 472...380
Sturt v. Mellish, 2 Atk. 610.....379
Sullivan v. State, 52 Ind. 309.....343
Summers v. State, 51 Ind. 201...343, 496
Sutherland v. Hankins, 56 Ind. 343.....143
Swain v. Bartlow, 62 Ind. 546...372
Swann v. Buck, 40 Miss. 268.....555
Swift v. Pierce, 13 Allen, 136..... 8

Talburt v. Berkshire L. Ins. Co., 80 Ind. 434.....196
Taggart v. McKinsey, 85 Ind. 392.310
Teague v. Fowler, 56 Ind. 569.....307
Terrell v. Prestel, 68 Ind. 86.....201
Terry v. Shively, 64 Ind. 106.....258
Teter v. Clayton, 71 Ind. 237.....514
Tevis v. Doe, 3 Ind. 129.....200, 466
Thayer v. Younge, 86 Ind. 259... 22
Thompson v. Thompson, 9 Ind. 323.....565
Thoma v. State, 86 Ind. 182.....474
Thomas v. Passage, 54 Ind 106...387
Thornton v. Williams, 14 Ind. 518.....287
Tinkler v. Swaynie, 71 Ind. 562...310
Toledo, etc., R. W. Co. v. Howell, 38 Ind. 447.....297
Toledo, etc., R. W. Co. v. Smith, 25 Ind. 288.....522
Toledo, etc., R. W. Co. v. Stevens, 63 Ind. 237.....520
Town of Brazil v. Kress, 55 Ind. 14.....535
Town of Columbia City v. Anthes, 84 Ind. 31.....535
Town of Covington v. Nelson, 35 Ind. 532.....486
Town of Edinburg v. Hackney, 54 Ind. 83.....535
Town of Ligonier v. Ackerman, 46 Ind. 552 (15 Am. R. 323)....534
Town of Martinsville v. Shirley, 84 Ind. 546.....186
Town of Sullivan v. McCammon, 51 Ind. 264.....535
Town of Tipton v. Jones, 77 Ind. 307.....486
Treadway v. Cobb, 18 Ind. 36.....448
Tripp v. Vincent, 3 Barb. Ch. 613..434
Tucker v. Murphy, 71 Ind. 576...371
Tyler v. Wilkerson, 27 Ind. 450..363
Tyler v. Wilkinson, 4 Mason, 397..346

Uland v. Carter, 34 Ind. 344.....133
Ulrich v. Drischell, 88 Ind. 354..501
Ulrich v. Hervey, 76 Ind. 107.....422
Utterback v. Terhune, 75 Ind.363.514

Vance v. Schroyer, 77 Ind. 501..332, 585
Vance v. Schroyer, 82 Ind. 114...585
Van Deusen v. Frink, 15 Pick.449.434
Vanduyn v. Hepner, 45 Ind. 589..471
Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465.....299
Village of Brooklyn v. Smith, 104 Ill. 429. (44 Am. R. 90).....139
Volger v. Sidener, 86 Ind. 545...422, 475
Voltz v. Newbert, 17 Ind. 187.....287
Voris v. State, 47 Ind. 345.....380
Voss v. Johnson, 41 Ind. 19.....363

Wainwright v. Straw, 15 Vt. 215. 8
Walker v. Clements, 15 Q. B. (N. S.) 1046.....469
Walker v. State, 6 Blackf. 1..... 83
Walpole v. Carlisle, 32 Ind. 415..321
Walpole v. Elliott, 18 Ind. 258...446
Wambaugh v. Bimer, 25 Ind. 368. 56
Warren v. Britton, 84 Ind. 14.....106
Washington Ice Co. v. Shortall, 101 Ill. 46 (40 Am. R. 196).....139
Water Works Co. v. Burkhart, 41 Ind. 364.....135, 559
Watson, etc., Co. v. Casteel, 68 Ind. 476.....263
Weaver v. Guyer, 59 Ind. 195.....363
Weaver v. Low, 29 Ind. 57.....372
Weaver v. Trustees, 28 Ind. 112..232
Webb v. Corbin, 78 Ind. 403.....170
Webb v. Portland, etc., Co., 3 Sumn. 189.....496
Webster v. Bebinger, 70 Ind. 9...304
Weis v. City of Madison, 75 Ind. 241 (39 Am. R. 135).....594
Wellman v. Lawrence, 15 Mass. 326.....491
Wentworth v. Alexander, 66 Ind. 39.....429
Wertz v. State, 42 Ind. 161.....295
Werner v. State, 51 Ga. 426.....419
West v. Cavins, 74 Ind. 265.....600
Western U. Tel. Co. v. Fenton, 52 Ind. 1..... 22
Westfall v. Hunt, 8 Ind. 174.....340
Weyer v. Thornburg, 15 Ind. 124..109
White v. Hicks, 33 N. Y. 383.....226
Whitesel v. Hiney, 62 Ind. 168...467
Wiggins v. Holley, 11 Ind. 2.....517
Wild v. Deig, 43 Ind. 455.....543
Wilder v. City of St. Paul, 12 Minn. 192.....344

Wiley v. Bradley, 60 Ind. 62..... 98
Wiley v. Howard, 15 Ind. 169....464
Willard v. Ware, 10 Allen, 263..226
Willett v. Porter, 42 Ind. 250.....145
Williams v. Henderson, 90 Ind. 577.....133
Williams v. Nelson, 23 Pick. 141..138
Williams v. State, 6 Blackf. 36...517
Williams v. Walton, 8 Yerger, 387 (29 Am. Dec. 122).....599
Willitts v. Ridgway, 9 Ind. 367..556
Willman v. Willman, 57 Ind. 500. 35, 544
Wilson v. Board, etc., 68 Ind. 507..327
Wilson v. Lemon, 23 Ind. 433.....517
Wilson v. Peelle, 78 Ind. 384.....423
Wilson v. Poole, 33 Ind. 443.....492
Wimberly v. Hurst, 33 Ill. 166...226
Winterbottom v. Derby, L. R., 2 Exch. 316..... 69
Winterrowd v. Messick, 37 Ind. 122.....512
Wolcott v. Hodge, 15 Gray, 547.. 25
Wolf v. Schofield, 38 Ind. 175.....233
Womack v. McAhren, 9 Ind. 6..285, 312
Wood v. Crane, 75 Ind. 207.....464
Wood v. Fowler, 26 Kan. 682 (40 Am. R. 330).....140
Woodbury v. Perkins, 5 Cush. 86. 25
Woodyer v. Hadden, 5 Taunt. 125.....496
Woolley v. Woolley, 12 Ind. 663. 33
Works v. Stephens, 76 Ind. 181...504
Worley v. Moore, 77 Ind. 567.....535
Wright v. Fansler, 90 Ind. 492...535
Wright v. Jordan, 71 Ind. 1.....285
Wright v. Shepherd, 47 Ind. 176..127
Wright v. State, 5 Ind. 290.....428
Wright v. State, 7 Ind. 324.....429
Wright v. Williams, 83 Ind. 421..239
Wright v. Wright, 72 Ind. 149...381
Wyble v. McPheters, 52 Ind. 393..599

Yates v. Clark, 56 Miss. 312 .....228
Yorston v. Yorston, 32 N. J. Eq. 495..... 40
Yost v. State, 80 Ind. 350.....409

Zoellner v. Zoellner, 46 Mich. 511. 40
Zonker v. Cowan, 84 Ind. 395.....512
Zook v. Simonson, 72 Ind. 83.....172

# JUDGES

OF THE

# SUPREME COURT

OF THE

## STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

---

HON. WILLIAM E. NIBLACK.*†

HON. GEORGE V. HOWK.†‡

HON. BYRON K. ELLIOTT.§

HON. ALLEN ZOLLARS.†

HON. EDWIN P. HAMMOND.‖

*Chief Justice at the May Term, 1883.

†Term of office commenced January 1st, 1883.

‡Chief Justice at the November Term, 1883.

§Term of office commenced January 3d, 1881.

‖Appointed May 14th, 1883, to succeed Hon. WILLIAM A. WOODS.

# SUPREME COURT COMMISSIONERS

OF THE

# STATE OF INDIANA,

## DURING THE TIME OF THESE REPORTS.

---

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.‡

* Chief Commissioner.
† Appointed April 27th, 1881.
‡ Appointed May 29th, 1882.

# OFFICERS

OF THE

# SUPREME COURT.

---

CLERK,

**SIMON P. SHEERIN.**

SHERIFF,

**JAMES ELDER.**

LIBRARIAN,

**CHARLES E. COX.**

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF JUDICATURE

OF THE

# STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1883, IN THE SIXTY-SEVENTH YEAR OF THE STATE.

---

No. 7677.

## BOYCE ET AL. *v.* MURPHY ET AL.

91 1
139 186

STATUTE OF FRAUDS.—*Agreement.—Parol Joint Contract for Benefit of One.—Principal and Surety.*—A., who was a retail dealer, with B., his friend, agreed, by parol, with a wholesale dealer, for the purchase of goods for A. on credit, to be charged to A. and B. jointly.

*Held*, that the agreement of B. was original and not collateral, and was not within the statute of frauds.

From the Henry Circuit Court.

*J. N. Templer*, *R. S. Gregory*, *M. E. Forkner*, *T. J. Blount* and *C. B. Templer*, for appellants.

*W. March*, *W. Brotherton* and *L. Newberger*, for appellees.

NIBLACK, C. J.—Action by John W. Murphy, William W. Johnston and William J. Holliday, partners doing business under the name of Murphy, Johnston & Co., against Arthur N. Galbraith and James Boyce, on an account, for goods sold and delivered.

The suit was commenced in the Delaware Circuit Court, but the venue was afterward changed to the Henry Circuit Court.

Galbraith answered, setting up an adjudication, and his discharge as a bankrupt.

Boyce answered: *First.* In denial; *Second.* Payment by Galbraith; *Third.* Payment by Galbraith's assignee in bankruptcy. Issue; trial by jury; verdict in favor of Galbraith, but against Boyce for $629.39.

The general verdict was accompanied by answers to numerous interrogatories submitted to the jury at the request of the parties respectively, all of which either supported or were not inconsistent with it. Motion for new trial by Boyce; remittitur by the plaintiffs for $73.37; motion thereupon overruled, and judgment against Boyce for $556.02.

Error is assigned only upon the refusal of the court to grant a new trial.

From the evidence introduced by the plaintiffs, supplemented by uncontradicted testimony offered by the defendants, the following may be given as a summary of the leading facts brought out at the trial:

The plaintiffs were wholesale dry goods merchants in the city of Indianapolis, and Galbraith was a retail merchant doing business at Muncie, in this State, upon limited means and credit. Boyce was a manufacturer of flax bagging at Muncie, and a man of considerable property and good credit; being a friend and neighbor, Boyce consented to accompany Galbraith to Indianapolis on the 15th day of March, 1876, to assist him in purchasing some goods he needed in his business, and went with him to the plaintiffs' place of business. Boyce there explained to Murphy, one of the plaintiffs, the object he had in view in accompanying Galbraith on the occasion. Murphy enquired how much goods they wished to buy. Galbraith answered about $1,500 worth. Murphy replied that as Galbraith was close to market he would advise him not to buy so much at a time, but to replenish more frequently. Boyce and Galbraith both acquiesced in that suggestion. Murphy then further enquired of Boyce how he desired to assist Galbraith. Boyce answered, "In any way that would be satis-

factory to the house." Murphy told Boyce that his simply saying that he would pay Galbraith's bills would not hold good in law; that there were two ways in which the proffered assistance might be rendered; one was to make a note for the amount he was willing to be liable for and have it carried to Galbraith's credit; the other way was that he might consent to have the goods charged to both him and Galbraith. In response to this explanation, Boyce repeated that any arrangement which would be satisfactory to the house would be also satisfactory to him; Boyce, continuing, said he did not want it known in Muncie that he was in any way interested in the business. Murphy told him they could mark the boxes and bill the goods to Galbraith alone, and in that way accomplish his desire in that respect. Boyce stated that he had confidence in Galbraith and intended to see him through; that he did not intend to engage in the business, but might give it some supervision.

At that point in the negotiation Murphy called a salesman and introduced him to Boyce and Galbraith, whereupon the salesman and they went out together to the sales rooms, where Galbraith devoted himself to the selection of the goods he ordered that day, and from which Boyce passed out of the building taking no part thereafter in the matter of purchasing goods for Galbraith. After Boyce and Galbraith left the counting-room, Murphy told the book-keeper and cashier of the firm to charge whatever goods might be ordered for Galbraith to Boyce and Galbraith jointly. Galbraith bought goods that day amounting to $490.49, which were billed and shipped to him, but were charged to him and Boyce jointly on the books of the plaintiffs. Galbraith purchased other bills of goods from time to time which were billed, shipped and charged in the same way. The last of these bills was made on the 28th day of September, 1876, and all in the aggregate, including the one filled on the 15th day of March, 1876, amounted to $2,558.30. Galbraith also made payments at different times aggregating $870.61.

No statement of the account made by Galbraith was ever sent to Boyce, nor was any demand of payment made on him, nor did he know that the account or any part of it was charged to him, nor that the plaintiff looked to him for payment, until this action was commenced, nor did Boyce have a pecuniary interest of any kind in Galbraith's business. Soon after the 28th day of September, 1876, the plaintiffs sent one of their clerks up to Muncie to see Galbraith, and to endeavor to collect of him the balance due upon the account. The clerk offered to take Galbraith's note for the balance if Boyce would endorse it, but Boyce declined.

This action was begun early in November, 1876, and in a few days thereafter Galbraith went into bankruptcy. The account in suit was afterwards proven against Galbraith's estate in bankruptcy, and before this cause was finally tried the plaintiffs received from the assignee in full of their dividend the sum of $73.37.

The court instructed the jury upon its own motion as follows:

"No. 5*a*. If the plaintiffs refused to sell goods to Galbraith, or to furnish him goods and look to Boyce for payment in the event that Galbraith did not pay, and informed Boyce that such an undertaking would not bind him, but offered to and did furnish Galbraith goods, upon an agreement with Boyce that they would look to him (Boyce) primarily, and in the first instance, jointly with Galbraith, and would give the credit to both defendants, and charge the goods jointly to them upon plaintiffs' books, then Boyce would be jointly liable with Galbraith to the plaintiffs for such goods so furnished, and this, although the goods were for the sole use of Galbraith, and Boyce had no interest therein or title thereto as between Galbraith and himself."

"No. 6*a*. If the jury believe, from the evidence, that in March, 1876, the defendants together visited the plaintiffs' place of business in Indianapolis, and it was there understood and agreed between them that the plaintiffs would sell to the

defendants jointly goods to the value of $1,500, or any other sum, to be billed and shipped to Galbraith at Muncie, a portion to be selected at the time and portions afterwards, as they were wanted by Galbraith, and to be charged to both defendants, and if the jury further believe from the evidence that all or any portion of the goods sued for were procured from the plaintiffs under such arrangement, both defendants would be liable to the plaintiffs for all such goods, without any agreement in writing, and in such case it would not be necessary for Boyce to be present or take any part in the purchase of the goods, or have any interest in them after they were purchased."

It is earnestly maintained by the appellant that these instructions did not state the law correctly as applicable to the facts of this case; that it is the substance of a transaction which must be considered in determining whether a promise in a given case is within the statute of frauds; that the fair inference from all the facts was that the goods were sold to Galbraith as principal, and to the appellant as his surety, and that from the very nature of the transaction the undertaking of the appellant was collateral and contingent only, and hence within the statute requiring such undertakings to be in writing; that an agreement by a promisor that goods sold to a third person shall be charged to him and such third person jointly, does not, in fact, make such promisor anything more than a mere surety for the payment of the value of the goods; that the true rule is, that one person can not be held primarily liable for a debt created by another, so long as the person creating the debt remains, to any extent, liable for its payment, citing authorities seemingly in support of that doctrine. The rule contended for is the recognized rule in all cases in which the debt has been created by some third person before the promisor agrees to pay it, but this rule evidently does not go to the extent to which the appellant seeks to carry it.

Browne on the Statute of Frauds, after enumerating sev-

eral classes of cases in which the promise to pay the debt of another must be in writing, concludes: "If, however, the credit is given to both jointly, as neither can be said to be surety for the other to the creditor, their engagement need not be in writing." Section 197.

Brandt on Suretyship, at the close of section 62, also says that "when credit is given to two jointly, and they are both principals, the statute does not apply to their engagement."

The conclusion reached by these authors has the support of many well considered cases in several of the States, and appears to us to be deducible from the language of the statute itself, which, as to cases like this, is to the effect that no action shall be brought "To charge any person, upon any special promise, to answer for the debt, default, or miscarriage of another. * * Unless the promise, * * or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. 1 R. S. 1876, p. 503; R. S. 1881, sec. 4904.

The inhibition of the statute is, as a careful reading of it will make apparent, only against verbal promises to answer for the debt of *another*, that is, for a debt or obligation which another has incurred, and not against debts created, in whole or in part, by the promisor himself for the benefit of another. In other words, the statute obviously applies only to promises which are in the nature of guaranties for some original or primary obligation, resting upon, and to be performed by, another, and which are usually denominated collateral undertakings. If there be no original or already existing liability on the part of another, there is nothing to which a merely collateral promise can attach, and hence any promise which results, or materially aids, in the creation of a new liability jointly with another, is necessarily an original promise, and not within the statute.

Browne and Brandt both cite the case of *Gibbs* v. *Blanchard*, 15 Mich. 292, as sustaining the doctrine respectively announced by them. That case may be regarded as a leading

case upon that phase of the statute of frauds to which it has an application. In that case, the facts were that Gibbs and one Daily called on Blanchard together. Gibbs asked Blanchard if he wanted to sell his mare, to which Blanchard replied in the affirmative. Gibbs, enquiring the price, and being told sixty dollars, wanted to know if Blanchard would take Daily's note if he, Gibbs, would also sign it and see it paid. To this Blanchard assented. The mare was not present, and Gibbs, being anxious to leave immediately for home, said that Daily might go with Blanchard and see the mare, and if she suited him he might bring her back with him, and sign a note for the price of the mare, and that the first time he, Gibbs, came to town he would also sign it. This arrangement resulted in the delivery of the mare to Daily, and in his signing a note for the agreed price payable at six months from date. Gibbs afterwards endorsed this note, but did so on Sunday, and his endorsement was, in consequence, admitted to be void. Blanchard, after waiting more than six months, brought suit against Daily and Gibbs jointly for goods sold and delivered. The note was produced at the trial and tendered back to the defendants. There was a verdict and judgment against both Daily and Gibbs.

The court in that case charged the jury that "if it was the understanding of the parties that Daily was the purchaser, and that he should give his note to the plaintiff for the price, and that Gibbs should so sign as only to be liable as endorser, the plaintiff must fail. If, however, the understanding of the parties was, at the time, that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase price, and, accordingly, should become joint makers of a promissory note for its payment, though Daily was less relied upon by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare, when bought, should belong to Daily, the plaintiff is entitled to recover. That the principle in this class of cases is, that if the agreement be such that two persons, in the purchase of goods, do

at the same time become co-debtors to the seller for the price, then both are purchasers, and the case is not within the statute of frauds, and no memorandum in writing is necessary. But if it be such that one, at the time, becomes debtor to the seller, and the other security only for the debt, it is within the statute of frauds, and the undertaking of the security is void unless a memorandum of it in writing is made."

Upon an appeal, the Supreme Court of Michigan, in the light of numerous authorities cited, distinguished and commented upon, in its review of the case, expressed the opinion, Judge CHRISTIANCY speaking for the court, that this charge was not only correct, but stated the law applicable to the evidence in the cause with remarkable clearness. That court, continuing further, said, that "The statute only applies to such promises made in behalf or for the benefit of another, as would, if valid, create a distinct and *several* liability of the party thus promising, and not a joint liability with the party in whose behalf it is made." All the judges present, including Judges COOLEY and CAMPBELL, concurred in affirming the judgment.

Other cases may be cited as according with this Michigan case. *Wainwright* v. *Straw*, 15 Vt. 215; *Hetfield* v. *Dow*, 27 N. J. L. 440; *Eddy* v. *Davidson*, 42 Vt. 56; *Downey* v. *Hinchman*, 25 Ind. 453; *Pettit* v. *Braden*, 55 Ind. 201.

A different doctrine, as to purchases made jointly, may be deduced from some other authors and cases, but these other authors and cases appear to us to be in the respect indicated against the weight of authority, and not in complete harmony with the statute of frauds. In this connection see Iglehart's Treatise on Justices of the Peace, 455; Baylies Sureties, 77; *Swift* v. *Pierce*, 13 Allen, 136; *Matthews* v. *Milton*, 4 Yerger, 575.

An examination, however, of the facts of each particular case brought to our attention, and of the questions actually presented for decision in each, makes it obvious that the seemingly conflicting conclusions arrived at, in many of these cases, are much more apparent than real.

In the case in hearing, the jury, in answer to one of the interrogatories submitted to them, found that the appellant agreed to become joint purchaser with Galbraith of goods to be delivered to the latter to the extent and of the value of $1,500, and that goods to that extent and value were sold to the appellant and Galbraith jointly.

There was evidence, deducible from practically admitted facts, tending to sustain this special finding of the jury, which was in harmony with, and in support of, the general verdict, and which made this case a parallel one in most material respects with the case of *Gibbs* v. *Blanchard, supra.*

The appellant has, consequently, no reason to complain of the instructions given as above by the circuit court upon its own motion.

Questions are made upon some instructions asked by the appellant and refused by the circuit court, but what we have said amounts to a practical decision of every material question presented in this cause.

The judgment is affirmed, with costs.

Filed Nov. 6, 1883.

---

No. 7245.

## RAWSON ET AL. *v.* PRATT ET AL.

| | |
|---|---|
| 91 | 9 |
| 126 | 443 |
| 91 | 9 |
| 142 | 333 |
| 91 | 9 |
| 150 | 432 |
| 91 | 9 |
| 159 | 186 |

GOOD-WILL.—*Incident to Locality or Place.—Stock of Merchandise.*—Good-will, as property, is intangible, and merely an incident of other property. As a general rule, it is not an incident of a stock of merchandise, but of locality or place, of the store-room or place of business.

SAME.—*Amount of Annual Sales.—False Representations.—Sufficiency of Counter-Claim.—Measure of Damages.*—In a suit upon certain promissory notes, the defendants, admitting the execution of the notes, alleged, by way of counter-claim, that they were given in consideration of the sale to the defendants by the plaintiffs of their stock of merchandise and of the good-will of the trade and business in which they were then engaged; that to induce the defendants to make such purchase, the plaintiffs represented that their annual sales, in such trade and business, were then and there $30,000; that the defendants relied upon these represen-

tations and were induced thereby, as the plaintiffs well knew, to make such purchase; that the representations were false and known so to be by the plaintiffs at the time, and were by them made for the purpose of cheating and defrauding the defendants in the premises; and that the sales of the plaintiffs in such trade and business were, in truth, only $15,000 per year. The defendants did not aver that they had purchased or procured from the plaintiffs any right or title to, or interest in, their store-room or place of business, or that the plaintiffs owned or controlled, or had any possessory right or interest in such store-room or place of business; but they alleged that they had obtained, as the plaintiffs well knew, a lease for one year of the store-room or place of business, theretofore occupied by the plaintiffs. Upon evidence tending to establish the foregoing facts:

*Held*, that the trial court did not err in instructing the jury that the measure of the defendants' damages, if any, in respect to the good-will of the plaintiffs' trade or business, was the difference between the rental value of a store-room, where the annual sales in such trade or business amounted to $30,000, and of a store-room or place of business where such annual sales were only $15,000.

*Held*, also, that the defendants' counter-claim was bad on demurrer, because it failed to allege that they had carried on any business, for any period of time, in the store-room previously occupied by the plaintiffs, or in any other place, or that the annual sales of the defendants had not been $30,000, or even more.

SUPREME COURT.—*Pleading.—Right Judgment.—Intervening Errors.*—Where it appears that, upon the statements in the pleadings, the right judgment has been rendered, it will not be reversed by the Supreme Court for intervening errors.

From the Elkhart Circuit Court.

*J. M. Vanfleet* and *J. S. Frazer*, for appellants.

*J. H. Baker* and *J. A. S. Mitchell*, for appellees.

HOWK, J.—In this case the appellees sued the appellants upon three promissory notes, executed by the latter and payable to the former, by their firm name of F. B. Pratt & Co. The cause was put at issue and tried by a jury, and a verdict was returned for the appellees; and over the appellants' motion for a new trial, and their exception saved, judgment was rendered on the verdict.

In this court the appellants have assigned a number of supposed errors; but, in their brief of this cause, their counsel

have discussed such questions only as arise under the alleged error of the court in overruling their motion for a new trial. The other supposed errors will, therefore, be considered as waived.

Before considering any of the questions discussed by the appellants' counsel, we deem it necessary to an intelligible presentation of the points decided, and of the grounds of our decision, that we should first give a summary at least of the case made by the pleadings, of the appellants' defence to the suit upon their notes, and of the appellees' replies thereto. In so doing it will only be necessary for us to give the substance of the fifth paragraph of answer, as the appellants concede that it "covers all the matters set forth in the fourth paragraph."

In the fifth paragraph the appellants alleged, in substance, by way of counter-claim, that on and before the 16th day of September, 1875, the appellees were merchants in the city of Elkhart, Indiana, and had long been engaged in trade in said city as such merchants; that the appellants Rawson and Charles A. Raynolds were citizens of the State of Ohio, desirous of engaging in business, as merchants, in the same city, and in the same line of trade, of which the appellees had notice; that said Rawson and Charles A. Raynolds, and the appellees, then and there entered into negotiations for the sale by appellees to the said appellants of the stock of merchandise, then possessed by the appellees, in their business and trade, and of the good-will of their said business; that to induce the said Rawson and Charles A. Raynolds to make said purchase, the appellees then and there represented to them that the appellees' sales, in their trade and business, were larger than the sales of any other mercantile establishment in the same line of trade in Elkhart county, and that such sales were then and there about $30,000 per year; that the said Rawson and Charles A. Raynolds, being ignorant of the extent of appellees' business, as they well knew, relied upon and confided in the truth of said representations, and were thereby induced

to and did then and there purchase said merchandise and good-will, with the purpose and intent of continuing and carrying on said trade and business at said city, in the same store-room, a lease of which for one year they had then and there obtained for that purpose, as the appellees well knew, at and for the sum of $9,468.77, payable as follows: $1,000 cash in hand, and eight instalments, of $1,000 each, payable respectively in six, twelve, eighteen and twenty-four months, and in one, two, three and four years, from September 13th, 1875, and another instalment of $468.77, due in fifty-four months from said date, the appellees also agreeing not to engage in said trade and business in the city of Elkhart, either as principals, agents or clerks, for the period of five years thereafter; and that the notes in suit were given for three of said deferred instalments, in consideration of the purchase of said merchandise and good-will, and of said agreement, and for no other consideration whatever, the appellant John F. Raynolds executing the same as the surety of the other appellants.

And the appellants averred that said representations of the extent of the sales of goods by the appellees, in their trade and business, were false, and known so to be by the appellees, when the same were made, and were by them made for the purpose of cheating and defrauding the said Rawson and Charles A. Raynolds, in the premises, who relying thereon, as the appellees then and there well knew, were induced to buy said goods and good-will, and to pay a greater price therefor than they otherwise would have done; that, in truth and in fact, the appellees' sales in their trade and business were not then and there larger or greater than the sales of any other establishment, in the same line of trade, in Elkhart county, and were not then and there about $30,000 per year, but were in truth only about $15,000 per year; by reason whereof said good-will was of less value, to wit, $10,000 less than if said sales had been as represented; that all the instalments, due prior to the maturity of the notes then in suit, had been fully paid and satisfied, and that appellants executed to appellees

their promissory notes for each of the said instalments, to be paid as aforesaid after September 13th, 1875, which remained unpaid; and that, by reason of the premises, they had sustained damages in the sum of $10,000; and that the notes in suit, and the other notes not yet due, were without consideration. Wherefore the appellants demanded judgment that the unpaid notes be delivered up to be cancelled and be adjudged satisfied, and that said Rawson and Charles A. Raynolds recover of the appellees $6,000, and other proper relief.

In the second paragraph of their reply the appellees alleged, in substance, that on the 12th day of August, 1875, one Caroline Pratt was the owner in fee simple of certain real estate in the city of Elkhart, and the buildings thereon, in which the appellees were carrying on the business of hardware merchants and manufacturers of tin-ware, having at said date a lease of said buildings which expired in about one month from said date; that at said date, by a written agreement entered into by and between the appellees and the appellants, the appellees agreed to sell and deliver to the appellants the entire stock of hardware, stoves and tin-ware, together with the tools and stock in their tin-shop, at the actual cash value thereof in the market, the said stock and tools having at the time an actual fixed value in the market; that it was then and there agreed in said written instrument that a complete and accurate invoice of all the different items of said stock and personal property, so agreed to be sold, should be made, and that the actual market or list value of the different articles and parcels of said stock should be fixed and agreed upon at the time the said invoice was so taken, the price-list as published by Hart, Blunt & Mead, wholesale dealers, being agreed upon as the market value; and it was further stipulated in said agreement that the stock when invoiced should be paid for as follows: $1,000 in cash, when said invoice was completed, and the balance of said invoice in the same instalments mentioned in said fifth paragraph of the appellants' answer; that it was further agreed by the owner of said build-

ings, that the appellants might, if they chose so to do, retain the possession of so much of said buildings as had been previously occupied by the appellees for sale room and store-room, for one year at an annual rental of $500, payable quarterly; that in pursuance of said agreement said invoice was taken, and the actual value of said merchandise was fixed and agreed upon; that the cash value of said stock and personal property so invoiced amounted to the sum of $9,468.77; that the appellants paid the appellees the sum of $1,000, and executed their notes in accordance with the terms of said written agreement, the notes in suit being part of them, and the whole consideration of said notes being the property so invoiced; that thereupon, in consideration of said money and notes, at the appellants' request, the appellees assigned and transferred, by a certain written instrument, all the aforesaid stock, and, without any consideration or previous agreement whatever, transferred to the appellants, at their request, the "good-will" of said business, the appellants having full knowledge of the ownership of said building; that the said Caroline Pratt afterwards executed to the appellants a lease of said store for one year, at the annual rental of $500; that thereupon the appellants took possession of said stock of hardware, which was of the actual value of $9,468.77, and they also took possession of said store-rooms under said lease, which were of the actual rental value of $1,000 per annum; that the appellants had actually sold all the stock and personal property so purchased of the appellees at a large profit; that after the appellants had occupied said store-rooms and prosecuted said business for one year under said lease, the said Caroline Pratt, at their request, without any representations whatever, by a new contract then and there made, leased said store-rooms to the appellants for one year at an advanced rental, to wit, $700 per annum. Wherefore, etc.

In the third paragraph of their reply the appellees said that the "good-will," in the appellants' counter-claim mentioned,

was sold, assigned and transferred to the appellants, without any consideration whatever.

In the fourth paragraph of their reply, the appellees alleged, in substance, that at the date of the transfer of said stock of hardware, in said counter-claim mentioned, and after said stock had been sold, there being at the date of the sale of said goods and stock no agreement whatever to sell or assign any "good-will" whatever, the appellee Caroline Pratt made the following agreement with the appellants, to wit: That in consideration of a rental of $500, she then leased to the appellants a part of the premises, in which said business had been carried on, and, in connection with the making of said lease, no representations whatever were made concerning the amount of business done at or in the said premises; that said rent was regularly paid until the expiration of said lease, and at the end of each year a new lease, upon a new agreement and new consideration, was made by said Caroline Pratt, who was all the time the owner of said building and place of business, the appellants having all the time full knowledge of the reputation of said place of business, and of the amount of business which the appellees had done therein.

From the summary we have given of the appellants' counter-claim, it will be seen that they allege therein that they had agreed to pay, and had in part paid the appellees a certain sum of money for their stock in trade, for the "good-will" of their store and business, and for an agreement, on their part, that they would not engage in the hardware business, either as principals, agents or clerks, within the city of Elkhart, for the space of five years from the 16th day of September, 1875. It will be observed, also, that their counter-claim contains no allegation of fact complaining, in any manner, of either the quantity, quality, or value of the stock in trade, so purchased by them of the appellees; nor do the appellants complain therein of any breach by the appellees, or either of them, of their alleged agreement not to engage

in the hardware business, in the capacities, within the territory or during the time specified in their contract. But it is manifest from the averments of the pleading, that the appellants have grounded their counter-claim for damages in this case solely upon the "good-will" of appellees' trade and business, which they purchased, as they say, from the appellees, in connection with their stock in trade, and their agreement, as aforesaid, not to engage in the hardware business, and for which, in part, they claim that the notes in suit were given.

The gist of the appellants' counter-claim is, that the appellees sold them the "good-will" of their trade and business, as hardware merchants, and falsely and fraudulently represented that such "good-will" was more valuable than, in fact, it was. Appellants' counsel claim that this was the substance of the counter-claim; and appellees' attorneys concede that "this is substantially a correct statement of the case." The appellants claimed that they purchased the "good-will" of a business whose annual sales were represented by the appellees to amount to $30,000. They alleged that they actually got by their purchase the "good-will" of a business whose annual sales amounted to only about $15,000, and therefore, they said that the "good-will" of the business, as it actually was, was of less value, to wit, in the sum of $10,000, than it would have been, if the annual sales of the business had, in truth, amounted to the sum represented by the appellees.

"Good-will," as property, is intangible, and merely an incident of other property. It was not in this case an incident of the stock of hardware, tools and machinery, which seem to have been the only tangible property purchased by the appellants from the appellees. As a rule, it may be said that "good-will" is never an incident of a stock of merchandise; but, generally speaking, it is an incident of locality or place, of the store-room or place of business. The appellants did not allege, in their counter-claim, that they had purchased or procured from the appellees any right or title to, or interest

in, their store-room or place of business, or that the appellees owned or controlled, or had any possessory right, or interest, in such store-room or place of business. But the appellants did aver, that they obtained, as the appellees well knew, a lease for one year of the store-room or place of business theretofore occupied by the appellees, though it was not stated from whom they obtained such lease.

The question arises, and this is the difficult and controlling question in this case, conceding that the appellees, as alleged, falsely and fraudulently represented to the appellants, to induce them to purchase, that the amount of the annual sales of their business was $30,000, when, in truth and in fact, such annual sales amounted only to about $15,000, under the facts averred and the law applicable thereto, what was the true measure of the appellants' damages by reason of such false and fraudulent representations? By what rule shall their damages be estimated?

In their brief of this cause the learned counsel of the appellants say: "We were compelled to differ with the court as to the mode of proving our damages at the trial. The theory of the * * * * court was that good-will is inseparable from the particular building in which the business was done, and that therefore the value of the good-will could only be measured by the increased rental value of the building, and, as a sequence therefrom, damages for false representations as to the amount could only be measured by showing how much greater the rental value of the building would have been if the false representations had been true. * * * The theory of the appellants was that the damages would be the difference in profits between a business of the magnitude represented and such a business as we actually got. At least we did not think the rule adopted was sufficiently favorable to our rights."

Upon the question under consideration the trial court, of its own motion, gave the jury the following instructions:

"You already understand, from the rulings of the court in

the admission of testimony, that this subject of good-will can be considered, and its value determined, only in connection with the leasehold or rental value of the building or rooms wherein the business was done, and it was in this view of the law that the court excluded any testimony as to the profits which any witness might suppose would have resulted from doing a business of one value or another, and the testimony was confined to the question, how much more would have been the rental value of the building if the business of Pratt & Co. had been $30,000 instead of $15,000 to $16,000, and I instruct you that, in this case, you must determine the damages, if you allow damages in respect to good-will, and, further, I instruct you that under the contract between these parties you can not allow damages in respect to good-will beyond the period of three years.

"By the increased rental value on account of the good-will attached is meant, not how much more money would the occupant of the building have made if the good-will had been as represented; that could never be certainly determined; but how much was the rental value increased, or would it have been increased; if attended by such a good-will how much more rent, for that place of business, would men generally pay for the purpose of carrying on there the same business for the sake of getting such good-will. In short, what is the good-will worth, fixing the value beforehand, taking the chance of realizing on it."

Taken together, these instructions contain, we think, as accurate, correct and fair a statement of the proper measure of the appellants' damages, in the case at bar, as could well be given. The case is an anomalous one, and it is difficult, if not impossible, to support the rule declared by decided cases or citations from text-books. The rule is founded, however, upon the peculiar nature of good-will as a commodity or property, and accords fully with the views on that subject already expressed in this opinion. We approve of the instructions quoted, as prescribing the best and most equitable rule, in our

opinion, for the measure of the appellants' damages, by reason or on account of the false and fraudulent representations of the appellees. Certainly we can not approve of the measure of damages which the appellants' counsel claim they were entitled to have applied in this case.

As bearing upon the questions discussed, and in support of the views expressed in this opinion, we cite in this connection the following authorities: *Squier* v. *Gould*, 14 Wend. 159; *Putney* v. *Hardy*, 99 Mass. 5; *Sieveking* v. *Litzler*, 31 Ind. 13; *Sheldon* v. *Houghton*, 5 Blatch. C. C. 285; *Chissum* v. *Dewes*, 5 Russ. 29; *Austen* v. *Boys*, 2 DeGex & Jones, 626; *Llewellyn* v. *Rutherford*, 13 Moak Eng. Rep. 328; *Cruttwell* v. *Lye*, 17 Vesey, 335; *Dougherty* v. *Van Nostrand*, 1 Hoffman Ch. 68; *Elliot's Appeal*, 60 Pa. St. 161; *Musselman's Appeal*, 62 Pa. St. 81 (1 Am. R. 382); *Baxter* v. *Conolly*, 1 Jac. & Walk. 556; Pars. Part., pp. 261 to 263; 1 Sedgw. Dam., pp. 612 to 614; Field Dam., section 286.

Our approval of the instructions quoted necessarily includes an approval of the rulings of the court in the admission and exclusion of evidence. We need not, therefore, examine these rulings in detail, for, upon the theory on which the cause was tried, the rulings complained of were manifestly correct.

We have found no error in the record which would authorize or require the reversal of the judgment.

The judgment is affirmed, with costs.

WOODS, C. J., having presided at the trial below did not participate in this decision.

Filed February 1st, 1883.

## ON PETITION FOR A REHEARING.

HOWK, J.—In this case the appellants' learned counsel ask a rehearing upon the ground chiefly that "the court overlooked, and did not decide," in the preceding opinion, certain questions arising upon certain instructions of the trial court, which, they insist, were erroneous. Certainly, we did not de-

cide the questions referred to; but we did decide what we regarded as the controlling question in the appellants' case, and the one upon which their counsel seemed to rely in their original briefs for the reversal of the judgment. We do not now find it necessary to consider or decide any of the questions which appellants' counsel claim we omitted to decide in our original opinion.

In this cause the appellants, entire case and defence are stated, by way of recoupment, in the fourth and fifth paragraphs of their answer or counter-claim. To each of these paragraphs the appellees demurred, for the alleged insufficiency of the facts therein, which demurrer was overruled by the court, and to this ruling the appellees excepted. In this court the appellees assigned as cross errors the decisions of the court in overruling their demurrers to the fourth and fifth paragraphs of appellants' answer or counter-claim. If these cross errors are well assigned, and we think they are, it is manifestly immaterial what, if any, errors of law occurred at the trial, for they could not, by any possibility, injure or harm the appellants. It is well settled, both by provisions of the civil code and by the decisions of this court, that a judgment will not be reversed for any error or defect in the proceedings which does not affect the substantial rights of the complaining party. Section 398, R. S. 1881; *Fell* v. *Muller*, 78 Ind. 507.

As stated in the preceding opinion, the appellants' counsel concede in argument that the fifth paragraph of answer or counter-claim "covers all the matters set forth in the fourth paragraph." In our former opinion, we have given a full statement of all the allegations of fact contained in the fifth paragraph of answer or counter-claim, and this statement need not be repeated in this opinion. In discussing the sufficiency of the facts stated in this fifth paragraph, upon the demurrer thereto, the appellees' learned counsel make the following points for the decision of this court:

"*First.* There are no facts stated from which any damages are shown to have resulted to the defendants;

"(*a.*) Because it does not appear but that the defendants have done an amount of business fully equal to that which the plaintiffs represented they were doing, previous to the sale;

"(*b.*) The price agreed to be paid for the good-will is not stated, nor is it stated that the stock, good-will and monopoly, which they actually got, were worth less as a whole than they would have been if the business had been as extensive as was represented.

"*Second.* It does not appear from the answers that the defendants, as part of the transaction for which the notes were given, leased or acquired any right to the place where the business had been carried on, or that they purchased anything from the plaintiffs to which 'good-will' could attach."

We are of opinion that these objections of appellees' counsel to the sufficiency of the fourth and fifth paragraphs of appellants' answer or counter-claim are substantially well taken, and that the demurrer thereto, for the want of facts, ought to have been sustained. It does not appear from the appellants' counter-claims that the appellees owned or controlled their store-room or place of business; but it is alleged therein that the appellants had obtained a lease for one year of such store-room, not, however, from the appellees, or either of them, nor as a part of the transaction for which the notes in suit were given. The appellants did not allege in their counter-claims that they had carried on the business of hardware merchants, or any other business, in such store-room or elsewhere, for the term of one year or for any other period of time. If it might be assumed, in the absence of any averment of the fact, that, after their purchase from the appellees, the appellants did engage and continue in the business of hardware merchants, in the said store-room, they also failed to allege in their counter-claims that their own sales were not "then and there about $30,000 per year," or even more, and, if less, how much less.

If, after their purchase from the appellees, the appellants

did not engage in nor carry on the business of hardware merchants in the said store-room, and we may assume that they did not, in the absence of an averment that they did, how could they be endamaged by the appellees' representations, however false they might have been, in regard to the amount of their annual sales? If the appellants did engage in and carry on said business in the said store-room, and their sales per year amounted to $30,000 or more, as, in the absence of an averment to the contrary, it may be assumed they did, what damages could or would the appellants sustain from the appellees' false representations in regard to the amount of their annual sales? The answers to these questions will readily suggest themselves and will clearly indicate, as it seems to us, how radically and fatally defective are the appellants' paragraphs of answer by way of counter-claim. We are of opinion, therefore, that the court clearly erred in overruling the demurrer to these paragraphs, as neither of them stated facts sufficient, by way of counter-claim or otherwise, to constitute any defence to the appellees' action. *Thayer* v. *Younge*, 86 Ind. 259. Upon the statements in their respective pleadings, we think the appellees were entitled to judgment for the amount due on the notes in suit, and in such case, although manifest errors may have intervened, the judgment must be affirmed. Section 566, R. S. 1881; *Western Union Tel. Co.* v. *Fenton*, 52 Ind. 1; *Dorman* v. *State*, 56 Ind. 454; *McCloskey* v. *Indianapolis, etc., Union*, 67 Ind. 86 (33 Am. R. 76).

The petition for a rehearing is overruled, with costs.

Filed October 1st, 1883.

---

No. 9092.

## Bowen et al. v. Eichel.

Bankruptcy.—*Discharge.*—*Judgment.*—*Injunction.*—A discharge in bankruptcy does not affect the judgment of a State court, rendered against the

defendant in an action pending at the time of the adjudication, but rendered after he was adjudged a bankrupt (the pendency of the proceedings in bankruptcy not being interposed), and its collection can not be enjoined.

From the Superior Court of Vanderburg county.

*A. Iglehart, J. E. Iglehart* and *E. Taylor*, for appellants.

*J. M. Shackelford* and *R. D. Richardson*, for appellee.

ELLIOTT, J.—It is alleged in the complaint of the appellee, that on the 4th day of March, 1878, the appellants instituted an action against him in the Superior Court of Vanderburg county, and on the 15th day of that month obtained judgment against him; that on the 11th day of the same month he was adjudged a bankrupt under the general law of the United States, and on the 13th day of August, 1878, obtained a discharge. The relief sought is an injunction restraining the collection of the judgment obtained by the appellants. A demurrer to this complaint was overruled and exception reserved. The answer of the appellants avers that there was due service of summons in the action instituted by them; that all the proceedings were regular; that they never filed any claim against the estate of the appellee, but relied entirely on their judgment.

The controlling question in this case is: Whether the appellee, having failed to defend the action instituted against him, is entitled to the benefit of the discharge awarded him in the bankruptcy proceedings?

There is much conflict in the cases, but we are inclined to think that the view that the defendant must interpose the proceedings in bankruptcy as a defence to the action prosecuted against him in the State court, is the only one that can be sustained on principle.

It is quite clear that the State courts have full jurisdiction, and, unless some barrier is interposed, may carry the cause to judgment, and if the defendant desires to change or impede the ordinary course of procedure, he must bring the proceedings in bankruptcy to the attention of the State court and secure a stay of proceedings. That he has a right to do this can not be seri-

ously questioned. Blumenstiel Bankruptcy, 482. One who has a defence, and full opportunity to avail himself of it, must make it or he can not afterwards assail the judgment. If he neglects to make good the benefit of his day in court, he is guilty of such laches as renders his appeal for judicial aid unavailing. The question we have in hand was decided as we now decide it, in *Steadman* v. *Lee*, 61 Ga. 58. The court there said: "It will thus be seen that the bankrupt must make application in some way to have the proceedings stayed in the State court. This he did not do, so far as the record discloses, and his own laches has allowed this judgment of a court of competent jurisdiction to be rendered against him. We hold, therefore, that the judgment is good, and that his discharge being subsequent thereto, does not relieve him from its operation." In discussing this question LOWELL, J., said: "The argument for the side which the defendant assumes in this case appears to me much stronger. Not only the technical doctrine of merger is involved, but the defendant has had his day in court and one opportunity to plead this defence; and I take it to be a rule of the highest importance that a defence which might have been made to the original cause of action can never be made to the judgment. Now the bankrupt act provides most carefully for a stay of suit until the defendant's discharge is passed upon; giving, by fair implication, a power to district courts even to enjoin actions in State courts, contrary to the general practice. All this is for the very purpose of enabling the bankrupt to plead his discharge. If he does not choose to avail himself of this right, what possible ground is there for saying that the judgment shall not bind him? Are we to enquire in each case why his plea was not set up or why it was overruled? It may be that the State court was of opinion that the discharge, if granted would be no bar. We can not impeach their decision collaterally. It may be that the bankrupt intended not to set up the discharge against this creditor. We can not

authorize him to reconsider this determination; it may be that he was surprised." *In Re Gallison*, 5 Nat. Bank. Reg. 353.

In support of this opinion are cited *Holbrook* v. *Foss*, 27 Maine, 441; *Fisher* v. *Foss*, 30 Maine, 459; *Pike* v. *McDonald*, 32 Maine, 418; *Sampson* v. *Clark*, 2 Cush. 173; *Woodbury* v. *Perkins*, 5 Cush. 86; *Faxon* v. *Baxter*, 11 Cush. 35; *Wolcott* v. *Hodge*, 15 Gray, 547. The question is thoroughly considered in the recent case of *Boynton* v. *Ball*, 15 Reporter, 783, and a conclusion reached which harmonizes with that stated by LOWELL, J., *In Re Gallison, supra.* In *Ray* v. *Wight*, 119 Mass. 426, it was said: "If, indeed, neither the bankrupt nor the assignee moves for a stay of proceedings, the court may proceed to judgment. *Dunbar* v. *Baker*, 104 Mass. 211; *Cutter* v. *Evans*, 115 Mass. 27." In *Doe* v. *Childress*, 21 Wal. 642, it was said that, "Where the power of a State court to proceed in a suit is subject to be impeached, it can not be done except upon an intervention by the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. * * * * * In *Kent* v. *Downing*, 44 Ga. 116, the court say: 'The assignee may on his own motion be made a party, if for no other reason than to have it properly made known to the court that the defendant has become bankrupt. He has also a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the court in some authentic mode. It may be denied, and the State court can not take notice of the judgment of other courts by intuition. They must be brought to the notice of the court, and this can not be done without parties.'" It was held, in the case from which we have quoted, that as the assignee had failed to intervene in the State court, and question the validity of the attachment, he could not afterwards impeach it, and this establishes the principle which we have indicated as the correct one; for, if the assignee is charged with the duty of intervening and bringing the bankruptcy proceedings before the State court, much more is the

debtor who is personally and directly interested in securing an effective discharge. If it be negligence on the part of the officer of the law to allow the State court to proceed uninformed, it certainly must be so for the debtor to allow his day in court to pass unused. As sustaining the conclusion stated by us we also cite *In Re Mansfield*, 6 Nat. Bank. Reg. 388; *Bradford* v. *Rice*, 102 Mass. 472 (3 Am. R. 483). In *Dormire* v. *Cogly*, 8 Blackf. 177, it was held that a judgment rendered after an adjudication in bankruptcy was not affected by the discharge, and although this decision was made under the bankrupt act of 1842, we think it has an important bearing on the present case, inasmuch as it holds that discharges do not release judgments rendered subsequent to the adjudication; and, this being granted, it must follow that the discharge relied on by the appellee is unavailing. If he would have avoided this result, he should have secured a stay of proceedings, and not have allowed the old debt to be transformed into a new one later than the adjudication, for upon such debts, that is, debts created subsequent to the adjudication, the discharge does not operate.

When the debt of the appellants was put into judgment, their claim was merged and their right of action bound up in the judgment, and their debt was, therefore, subsequent to the adjudication in bankruptcy, and not embraced by the discharge. This doctrine of merger extends so far as to merge a judgment on which an action is brought in the last judgment and to destroy the lien of the former. *Gould* v. *Hayden*, 63 Ind. 443. If the judgment has this force where it rests on a debt evidenced by a judgment, it must surely have it when it rests on an ordinary chose in action.

Judgment reversed.

Filed June 28th, 1883.

Petition for a rehearing overruled Oct. 12th, 1883.

No. 10,573.

## EARLE v. EARLE.

DIVORCE.—*Setting Aside Decree.*—A decree of divorce can not be reviewed under the statute authorizing the review of judgments in ordinary civil actions.

SAME.—*New Trial.—Practice.*—A new trial in an action for a divorce can not be had after the term at which the decree may have been rendered, under the statute providing for new trials in other civil causes.

SAME.—*Judgments, Power of Courts to Set Aside.*—The power of courts to set aside judgments are not restricted by the statutory provisions in relation to the vacation of judgments to the causes and modes therein specified, to the exclusion of all other causes and modes.

SAME.—*Fraud.*—Courts have power, in a direct proceeding, to set aside and vacate judgments obtained by a fraud upon the court, and this power extends to decrees of divorce. *McQuigg* v. *McQuigg*, 13 Ind. 294, and cases following it, overruled.

SAME.—*Diligence.*—It is necessary, in order to set aside a decree of divorce on account of fraud in obtaining it, that the party complaining should commence the action therefor without unreasonable delay upon discovery of the fraud, so that innocent third parties may not suffer.

SAME.—*When Court Will Not Set Aside.*—A decree of divorce, valid upon the face of the record, will not be set aside for fraud if the party asking it, with knowledge of the fraud, has delayed bringing an action therefor for nearly fifteen years after the decree, the other party having entered into a marriage with an innocent party, and having children born of such marriage.

JUDGMENT.—*When Void and Voidable.*—A judgment by a court of competent jurisdiction is not void in a legal sense unless the thing lacking or making it so is apparent upon the face of the record. If the infirmity do not so appear, the judgment is voidable but not void.

| | |
|---|---|
| 91 | 27 |
| 158 | 99 |
| 91 | 27 |
| 159 | 501 |
| 91 | 27 |
| 160 | 214 |
| 160 | 215 |
| 160 | 422 |
| 160 | 423 |

From the Kosciusko Circuit Court.

*E. B. McClanahan* and *W. S. Marshall*, for appellant.

*J. Bradley* and *J. H. Bradley*, for appellee.

ZOLLARS, J.—This is a proceeding instituted by appellant to have a decree of divorce, procured by appellee, set aside and vacated.

The question for decision is presented by the ruling of the court below in sustaining a demurrer to the complaint. The following abstract of the complaint, as we find it in the brief

of counsel, with a few additions, is sufficient for the purposes of this opinion:

Appellant filed her bill in this cause in July, 1882, stating, among other things, that on the 19th of April, 1854, in the county of Lake and State of Indiana, she intermarried with appellee, and with him lived until August 1st, 1866, when the appellee causelessly filed his petition in the common pleas court of Lake county, Indiana, for a divorce; that, on September 4th, 1866, a rule was had on appellant herein to answer, and that, from a transcript of the record, it appears that she appeared and withdrew her appearance, when she was defaulted; that an affidavit was filed to set aside the default and continue the cause; that the affidavit is missing, and that on January 7th, 1867, the cause was dismissed on motion of plaintiff; that of this proceeding appellant never heard until within a few days before the filing of the bill in this cause; that, on April 9th, 1867, appellee filed another like petition in the same court; that summons issued and was, on April 25th 1867, returned, showing personal service, and that proof was taken and preparations were made to try this cause; and that about August 1st, 1867, three months later, appellee, in the circuit court of Kosciusko county, filed his third petition for divorce, identical in its allegations with its predecessors, one of which was pending, desertion being the ground alleged. On September 16th, 1867, the second bill, filed on April 25th, 1867, was dismissed. Summons issued on the filing of the petition in Kosciusko county, on August 1st, 1867, and, as it is fraudulently pretended and asserted, said summons, on August 9th, 1867, came into the hands of the sheriff of Lake county, and a false, fraudulent, and pretended return is made in these words: "By leaving a certified copy at the last named place of residence of Miriam H. Earle. Signed Andrew Krinbill, sheriff of Lake county, per J. R. Uptigrove, deputy." That appellant was never served personally or constructively; that she did not appear, nor did she know of the pendency of the proceeding in Kosciusko county until long after the same

had terminated in the rendition, upon default taken, of a void judgment of dissolution; that the said Uptigrove, who signed his name to said return as "deputy," was not, at the time of such service, a regular deputy sheriff of the county and State aforesaid, and not being such, that he had no right under the laws of Indiana to serve such process, and that said sheriff of Lake county had no power by deputation to clothe him with such authority; that several months after said void decree was rendered, she first learned that said pretended deputy had the summons in his possession, and knew if he were such deputy that he could easily get actual personal service on appellant, but that, in pursuance of a fraudulent scheme and conspiracy, the said alleged deputy caused the movements of appellant to be watched, so that when she should absent herself from her home he would then go and pretend to leave a copy at her residence; that said fraudulent and pretended deputy received said summons issued about August 1st, 1867, into his possession on August 2d, 1867, and so continued to hold the same until August 9th, the day of said pretended service and return; that from August 1st to the 9th, appellant was continuously at her home, as said pretended deputy well knew, but that while being watched by said pretended deputy, she, on August 9th, left her home to visit an invalid friend living many miles distant, and that, intending and designing to evade appellant, said pretended deputy did repair to her house and was seen to place a paper on the door nob, and shortly thereafter, on same day, to return and remove and carry away the same paper, and before her return, he knowing she had not returned; that appellant, on her return, entered her home through that door, and there was no paper of any kind there; that she did not learn of this until long after the termination of said suit; and that he fraudulently removed said paper to prevent her from receiving notice; that the suit in Lake county for the same cause was pending and being prosecuted in aid of the same fraudulent design; that she was duly summoned in the Lake

county suit; that she entered her appearance; that she was served with notice by appellee to take depositions, which were taken and filed in Lake county; that on May 6th, 1867, she caused notice to take depositions to be served on appellee; that the cause was continued; that she took her depositions, which were filed in the cause; that she watched closely said cause; day was set for the trial, which did not take place, because, on September 6th, 1867, appellee caused the same to be dismissed; that on September 3d, 1867, three days before the dismissal, he had obtained a decree of divorce in the case in Kosciusko county, in a different circuit from the one to which Lake county belonged; that the suit in Lake was merely a part of his scheme and conspiracy to mislead and defraud, and that in twenty-six days after he filed his bill at Warsaw, in Kosciusko county, he obtained the fraudulent judgment (which the bill in this case is filed to impeach); and not only this, but that appellee was not a resident of Kosciusko county when he filed his bill or obtained his decree; that he and appellant were both then residents of Lake county; that with intent to deceive and defraud the court by the false and fraudulent return to the snmmons, he concealed from the court in Kosciusko county the pendency of the suit in Lake county, well knowing, also, that appellant had no knowledge or notice of the proceedings in Kosciusko county, whereby the proceedings in Kosciusko county are void *ab initio;* that appellant still claims appellee as her husband; that appellee is living now with another woman, whom he claims as his wife; that by her he has living two illegitimate children, and that by appellant he has two children—one an invalid daughter twenty-six years of age, and a son who has just attained his majority; that she has lived in poverty and tears since the said decree was obtained, and that since then appellee has never contributed one cent to her maintenance and support, although he has all along possessed a large amount of property.

Whether all or any of the matters stated in the complaint are, in fact, true, we can not tell. The demurrer admits the

truth of all well pleaded, and we must deal with the case upon that basis. The complaint presents a case of a deliberate determination to defraud and injure appellant, and to prostitute the courts of the State in the accomplishment of that end. The court, in Lake county, which had jurisdiction of the parties, was used as a decoy to attract and fix the attention of the wife, while the court in Kosciusko county, by a false and fraudulent return to a summons, and false statements as to the residence of the appellee, if by no other means, was misled and deceived into the rendition of a decree of divorce, thus breaking up and wrecking one family, and making it possible for innocent third parties to suffer. The State and its people have suffered not a little in their reputation in the past on account of the supposed facility with which divorces have been procured. The fault, if there has been fault, has not been on the part of the courts, the people or the laws, but in the abuse of them by designing and unscrupulous litigants.

The case, as presented in the complaint, is one calling loudly for relief, if it may be granted in accordance with well settled rules of the law.

It is a principle as old as the laws of civilized communities, that a party shall not be condemned without a hearing or notice, and thus an opportunity to be heard. It is true, that in this State, the policy has been not to review or disturb decrees of divorce. This rule has been adopted by the Legislature and the courts from considerations of public policy. But such considerations do not sanction the upholding of decrees rendered in fraud of the courts. Every consideration demands that fraud upon parties shall be rebuked; that the laws shall be honestly and faithfully administered, and that the courts, which are the conservators of society, shall purge their records of all judgments and decrees procured by deception, fraud, or perjury. While considerations of public policy may forbid the review of decrees of divorce, they apply only when decrees are, in fact, rendered, the court

having jurisdiction of the subject and of the parties. Public policy demands that the homes of the land shall be preserved intact. These homes constitute the foundation upon which rests the fabric of society and stable government. The public has such an interest in them that the husband and wife may not, at their pleasure, by collusion, or by deceit or fraud, break them up. Of course, there are cases where divorces may be proper and necessary, and for such the law has provided. But laxity in the granting of divorces leads to laxity in marriages, and these together tend to dissolution and overthrow. That a grievous fraud was perpetrated upon appellant there can be no doubt. And no less a fraud was perpetrated upon the court. The law in force at the time this decree was rendered provided that divorces might be decreed by the circuit or common pleas courts of the State, on petition filed by any person who, at the time of the filing of such petition, was a *bona fide* resident of the county, etc., which *bona fide* residence should be proven to the satisfaction of the court trying the same. Appellant was not a resident of Kosciusko county, and if proof of such residence was made, as we must presume, it was by means of perjury. And so, too, the law required that, upon the filing of such petition, the clerk should issue a summons for the defendant, etc., which summons should be personally served on the defendant, if a resident of the State, either by reading or by leaving a copy thereof at his or her usual place of residence. Such a summons was issued. It is averred that it was not served personally by reading, nor was it served by copy in the sense required by the law, but, by fraud and connivance, a pretended service was made, with the design and purpose that appellant should have no notice of the outrage upon her and the court, which was being consummated in Kosciusko county. And thus, the court, by perjury and a false return, was cheated into assuming jurisdiction and rendering a decree which, in effect, rendered appellant a widow and her children orphans.

In the consummation of this wrong appellee doubtless deceived and misled his counsel also.

The courts of this State can not review judgments of divorce; this is prohibited by statute. In some of the earlier cases it seems to have been held that, in order to obtain relief from a judgment, the statute must be followed, and that the mode therein pointed out is exclusive of all others, and that as it is provided that judgments of divorce can not be reviewed, there is no remedy.

In the case of *McJunkin* v. *McJunkin*, 3 Ind. 30, an application was made to open up a decree of divorce for the purpose of defending upon the merits. It was held that the provisions of the statute in relation to opening decrees for a defence in certain cases, did not apply to decrees of divorce, and the application was denied upon an affidavit being filed by the petitioner in the divorce case, that since the decree he had remarried. This, it will be seen, was not an application to vacate the decree for fraud.

In the case of *Woolley* v. *Woolley*, 12 Ind. 663, an application was made under the section of the statute authorizing the court in certain cases to relieve parties within a year from judgments taken against them, through mistake, inadvertence, surprise, or excusable neglect. The court below set aside the judgment, so far as alimony was concerned, after the expiration of the year. The judgment seems to have been reversed for this reason. As to whether or not a decree might be vacated for fraud was not decided, but left in doubt.

In the case of *McQuigg* v. *McQuigg*, 13 Ind. 294, an application seems to have been made to vacate and set aside a judgment of divorce for fraud in obtaining it; what the fraud was does not appear in the opinion. From the brief of appellee's counsel we learn that the fraud charged was that at the time the decree of divorce was rendered, the petitioner was not a *bona fide* resident of this State, but of the State of New York, and made a temporary sojourn in Indiana for the sole purpose

of obtaining the divorce. Three years had passed between the granting of the divorce and the application, and the petitioner, in the mean time, had remarried. PERKINS, J., after holding that the decree could not be set aside under the provisions of the statute, added the following: "In *Woolley* v. *Woolley*, 12 Ind. 663, a doubt was expressed whether the common-law right to set aside a judgment of a superior court by bill in chancery for fraud, or by a complaint in the nature of such a bill, had not been superseded entirely by the various provisions enacted into our code of practice, under which judgments may be vacated. Further reflection has confirmed us in the opinion that such is the fact, and that the statutory modes must be resorted to. This being the case, it follows that judgments of divorce can only be set aside upon a motion for a new trial, made within the time allowed therefor, and that the suit in the case now before us can not be maintained."

The case of *Hoffman* v. *Hoffman*, 15 Ind. 278, was decided upon the authority of the *McQuigg* case, without comment.

The case of *Quick* v. *Goodwin*, 19 Ind. 438, was an action against an executor, asking that a sale of lands by him be set aside on account of fraud. The doctrine of the *Woolley* and *McQuigg* cases was applied to the case before the court, and upon the authority of those cases it was held that the remedy pointed out by the statute should be pursued in the form and manner therein indicated. The court added: "We suppose, under an application to review, etc., fraud in obtaining a judgment may be shown, as a cause, etc."

In the case of *Rindge* v. *Rindge*, 22 Ind. 31, a *quasi* consent was given to the doctrine of the *Woolley* and *McQuigg* cases.

In the case of *Gage* v. *Clark*, 22 Ind. 163, which was an action in the common pleas court to vacate a judgment rendered before a justice of the peace, and to obtain a temporary injunction, PERKINS, J., rendering the opinion, approved the doctrine of the *McQuigg* case, holding that the mode of vacating judgments pointed out by the statute must be followed,

and suggested that, possibly, that mode might be made applicable to justices' courts.

In the case of *Ewing* v. *Ewing*, 24 Ind. 468, the *Woolley* case, in 12 Ind., *supra*, was approved, and it was held that a new trial or rehearing could not be had in a divorce case under sections 99 and 356 of the code of 1852.

It may be said that the uniform ruling of this court has been that a judgment of divorce can not be reviewed under the section of the code authorizing such a proceeding in ordinary actions, and that new trials after the term at which decrees may have been rendered, can not be had in divorce cases under the section of the code authorizing such new trials in ordinary civil actions.

From the cases above examined, the former rulings seem to have been that no relief could be had from judgments in any case, except in the manner pointed out in the code, and that as no mode is provided by statute in divorce cases, no relief from such judgments could be had. Scattered through the reports, there are *quasi* recognitions of the rule that judgments may be vacated for fraud, independent of the mode provided in the code, and possibly there may be direct rulings to that effect, which we have overlooked in our present research.

The later, and, we think, better considered cases have departed very materially from some of the cases above examined. In the case of *Willman* v. *Willman*, 57 Ind. 501, the rule that judgments in divorce cases can not be reviewed under the code, is recognized, but it is limited to cases of valid and subsisting judgments, and a distinction is drawn between a proceding to review a judgment, and one to vacate and set it aside. It was accordingly held in that case that the decree, appearing to have been rendered without jurisdiction of the defendant, was void, and should be vacated and set aside. In the case of *Nealis* v. *Dicks*, 72 Ind. 374, it was held that the statute concerning the review of judgments does not restrict the power of the courts to set aside judg-

ments to the causes and modes therein specified, and to the exclusion of all other causes and modes, and that the courts have the power and the right to set aside and vacate judgments obtained by fraud. The distinction proper to be made in all cases is made in this between fraud in obtaining a judgment, and fraud constituting a defence to the action. The case of *Quick* v. *Goodwin*, 19 Ind. 438, *supra*, is noticed and disapproved, so far as it conflicts.

The case of *McQuigg* v. *McQuigg*, 13 Ind. 294, is not noticed, but the doctrine announced, we think, is in conflict with it, so far as it relates to the power of the courts to vacate and set aside judgments obtained by fraud. Equally as strong as the case cited from 72 Ind., *supra*, is the late and well considered case of *Cavanaugh* v. *Smith*, 84 Ind. 380.

These late cases, supported as they are by reason and a very full citation of authorities, establish the doctrine in this State that judgments obtained by fraud upon the court may be successfully assaulted for that reason, and that in such assault the grounds and mode pointed out in the statute are not exclusive. See also *Sanders* v. *State*, 85 Ind. 318 (44 Am. R. 29), and the authorities cited. That judgments thus obtained may be overthrown, vacated and set aside in a direct proceeding for that purpose, is well settled by the law-writers and the adjudicated cases. Bigelow Frauds, 175; *Edson* v. *Edson*, 108 Mass. 590 (11 Am. R. 393); *Allen* v. *Maclellan*, 12 Pa. St. 328; *Johnson* v. *Coleman*, 23 Wis. 452; *Singer* v. *Singer*, 41 Barb. 139; *Adams* v. *Adams*, 51 N. H. 388, 399 (12 Am. R. 134); *Boyd's Appeal*, 38 Pa. St. 241.

It will be noticed, that among the above citations are included a number of divorce cases. No distinction is made in the application of the rule between divorce cases and others, and there is no reason that there should be. Nor is there any reason for a distinction in this State. As we have seen, the statute makes a distinction, so far as relates to the review of judgments, and this distinction has been maintained in the granting of new trials after the term, etc. But where,

by deceit and fraud, a court is deceived into assuming jurisdiction and entering decrees dissolving the marital tie and obligation, every consideration of public policy and regard for innocent children require that the court, upon the discovery of such fraud, shall protect itself and the public therefrom.

We think, therefore, that when such a wrong has been consummated in the obtaining of decrees of divorce, the courts have the right and owe the duty to set them aside and declare them null and void, and that so far as the case of *McQuigg* v. *McQuigg*, *supra*, and the cases following it, conflict with the conclusion reached, they should be overruled. Very much good, we think, will come from the adoption of the rule in divorce cases, and no harm, provided the injured party is not negligent in moving, upon the discovery of the fraud. Possibly, in some cases, a second husband or wife may innocently be made to suffer, but, with proper restriction, this is not more likely than in the reversal of decrees on appeal to this court.

It is proper and right in the administration of the law to protect innocent third parties, who may marry a divorced man or woman, but it is quite as proper and important to protect the husband and wife and innocent children from fraudulent divorces. Some of the cases in this State, in which relief has been denied, are forcible illustrations of the necessity of the rule here adopted. The adoption of the rule is essential to the complete administration of justice, will tend to protect the courts and the family from fraud and wrong, and will serve as a warning to those inclined to practice such fraud.

This brings us to another branch of the controversy, which, in this case, will prevent the granting of the relief asked. It appears from the averments in the complaint that the decree of divorce was rendered in August, 1867. The bill in this case was not filed until July, 1882. Appellant thus allowed near fifteen years to pass without informing the court of the fraud, or making any effort to have the de-

cree set aside. It is apparent that she has had knowledge of the decree, and of the fraud upon her and the court, during almost the entire time. A second marriage has been contracted by appellee with another woman, whom we must presume to be innocent of any wrong, and two children have been born as the fruit of that marriage. The record of the divorce proceedings shows, upon its face, a valid service of the summons upon appellant, and it is fair to presume that in all other respects the record is regular in form. Upon its face it is not void, and it is possible that the second wife entered into the marriage relation with appellee, relying upon that record.

It will be observed, too, that it is not averred in the complaint in unqualified terms, that the party who made the pretended service of the summons had no authority to make a valid service. It is said that he was not a regular deputy sheriff, and that the sheriff of Lake county had no power by deputation to clothe him with authority to serve the writ. These allegations are somewhat argumentative in form, and include in them an error of law. The sheriff has authority to appoint a deputy to serve a particular writ. *Proctor* v. *Walker*, 12 Ind. 660.

The allegations of the complaint do not exclude the idea that this was done by the sheriff of Lake county; rather, the assumption is, that it was, but was void for want of authority on the part of the sheriff to make such an appointment. Such being the case, the law is well settled, we think, that in order to have such decrees set aside for fraud in obtaining them, the complaining party must move without unreasonable delay, upon the discovery of the fraud, so that innocent parties may not be made to suffer. No excuse is offered by appellant for the long delay except that she has been poor, and has waited until her son should attain his majority. This we think is not sufficient. For aught that appears, she was as well able from the first as now, to move in the matter, and we are not

informed in what manner the age of the son is of any material importance.

It is the general rule that parties seeking relief from fraud must move promptly upon the discovery of such fraud, and this rule may, with reason, be applied to a case like this.

In the case of *Moon* v. *Baum*, 58 Ind. 194, this court said:

"A party seeking to set aside a judgment for fraud in obtaining it, or an agreement for fraud in its execution, must proceed promptly upon the discovery of the fraud. An unexplained delay, without valid excuse, for more than five years, as in the present case, will defeat an action seeking a remedy against fraud."

In the case of *Singer* v. *Singer*, 41 Barb. 139, the court said:

"Independent of any other considerations, if the motion was properly made, and in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside, not from any regard to the parties concerned, but from motives of public policy. In such a case, however, it should be made apparent, that the party so moving was acting from good motives, and not for any expected personal advantage. But where the judgment of divorce has been acquiesced in for a period of several years, and the plaintiff has again been married, some better reason than the mere gratification of personal feeling, or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application. As I have already said, the ground on which such an order could be made would be one of public policy, but no such reason should suffice where, after the acquiescence of both the parties in the judgment for three years, an innocent person has become involved by marriage, and the opening of the judgment would involve her in distress, and perhaps disgrace. This reason alone would be sufficient to justify me in denying the motion, if there were no other reasons for doing so."

In *Nichols* v. *Nichols*, 25 N. J. Eq. 60, the Chancellor uses the following language, on page 65:

"Further, the complainant returned to New Jersey in July, 1868, immediately after the divorce was granted. The defendant, at about the same time, settled in Brooklyn. In 1870, he was married to the woman with whom, in the bill of complaint in this cause, the adultery is charged to have been committed, and that alleged adultery is the connubial intercourse between them. By her he has a child, the fruit of their marriage. The complainant filed her bill in July, 1872, four years after the decree of divorce was made, and over two years after her husband had contracted the second marriage. No reason or excuse is given or appears, for this delay in applying for relief against the proceedings of which she complains. * * Here is a longer delay, wholly unexplained. * * * Public policy does not require the intervention of this court between these parties. It rather forbids."

*Yorston* v. *Yorston*, 32 N. J. Eq. 495. In this case Chancellor RUNYON uses the following language, page 505:

"For seven years she" (complainant) "acquiesced in it and in the marriage which supervened upon it, and in those years three children have been born of that marriage, two of which are living. If the decree of divorce were set aside, the subsequent marriage would thus substantially be declared illegal, and the children thereof illegitimate. The complainant gives no good reason, and there appears to be none, for her long delay in seeking the aid of this court against the decree. * * * She must be adjudged to have acquiesced in the divorce and subequent marriage."

The same rule is recognized in the case of *Edson* v. *Edson*, 108 Mass. 590, already cited. *Smith* v. *Smith*, 3 Phila. 489; *Fidelity Ins. Co.'s Appeal*, 93 Pa. St. 242; 2 Bishop Marriage and Divorce, section 753*b*. The author says: "And the party defrauded must, if he would be heard, make his application with reasonable promptness after he has acquired knowledge of the fraud." *Zoellner* v. *Zoellner*, 46 Mich. 511.

In this case, the parties were residents of Detroit in the

State of Michigan. While the wife was temporarily absent at Toledo, in the State of Ohio, the husband procured a divorce from her on notice by publication alone. Soon after the rendition of the decree the husband notified her of the fact. The wife afterwards sought to have the decree set aside for fraud. The court says: "The defects in the proceedings which are now set up were open to detection by the least attention to facts which must have been obvious to her, and the notice from her husband, and the surrounding circumstances with which she was intimate, were urgent calls upon her to look into the proceedings. In short, if her present explanations are correct the facts of which she had full knowledge implied conclusively that the decree was a fraud, and there is no reason to suppose that she was not then as eligibly situated to take action as she is now. And although she continued in the same near neighborhood, she yet waited from the fall of 1872 until the 31st of March, 1881, an interval of between eight and nine years, and including in it the period of more than seven and a half years whilst complainant was living and the space of nearly a year subsequent to his death. And the case is bare of circumstances to palliate the delay. The proceeding is consequently subject to the proposition that the public peace and good order are concerned in withholding the assistance of equity from those who grossly neglect to take care of their own rights."

It follows, from what we have said, that, on account of appellant's laches, the court below did not err in sustaining the demurrer to the complaint, and that the judgment must be affirmed.

The judgment is affirmed at the costs of appellant.

Filed June 20, 1883.

## On Petition for a Rehearing.

Zollars, J.—The elaborate argument of the learned counsel in support of the petition for a rehearing is based mainly, upon the assumption that the decree of divorce was and is

absolutely null and void, and that hence no amount of laches, nor length of acquiescence, can deprive appellant of the right to have the decree set aside and vacated. The assumption of this false premise is the vice in the argument which leads to a false conclusion. It is distinctly stated in the opinion that, so far as shown by the complaint in this case, the decree of divorce is not void.

The record in this case does not contain a copy of the decree and proceedings in the Kosciusko Circuit Court. The infirmities in those proceedings, so far as shown by the complaint, are not such as appear upon the face of the record. They are such as render the judgment voidable, but not void. As we said in the recent case of *Smith* v. *Hess*, *post*, p. 424, which was decided after a very full and careful examination: "Some confusion has been brought into the cases by the use of the terms void and voidable as applied to judgments. Judgments are frequently spoken of as void, because they may be so declared in a proper proceeding. The general and correct rule, as established by the weight of authority, is, that a judgment by a court of competent jurisdiction is not void, unless the thing lacking, or making it so, is apparent upon the face of the record. If the infirmity do not so appear, the judgment is not void, but voidable. One is a nullity, a mere *brutum fulmen*, and may be so treated by all persons, in collateral as well as direct attacks. The other, except in certain cases of fraud, is binding upon third parties, and upon the parties to it, as against a strictly collateral attack. Freeman Judg., section 116; *Allen* v. *Huntington*, 16 Am. Dec. 702; *Gall* v. *Fryberger*, 75 Ind. 98; *Bloomfield R. R. Co.* v. *Burress*, 82 Ind. 83; *Coan* v. *Clow*, 83 Ind. 417; *Cain* v. *Goda*, 84 Ind. 209; *Krug* v. *Davis*, 85 Ind. 309; *Pressler* v. *Turner*, 57 Ind. 56; *Evans* v. *Ashby*, 22 Ind. 15."

The Kosciusko Circuit Court is one of record and general jurisdiction, with full power to hear and render decrees in cases for divorce. It had jurisdiction of the subject-matter, and, so far as shown by the record, of the persons of the pe-

titioner and defendant. Except as pointed out in the complaint in this case, we must presume in favor of the regularity of the proceedings. The return of the summons in the divorce case, as shown by the complaint in this, was regular and valid. A person examining the record in that case would find nothing indicative of the wrongs and frauds complained of. The wrongs and frauds were upon the defendant and upon the court, which are not of record, and do not render the judgment void in a legal sense, but voidable. For the purposes of this case, it may be conceded that neither laches, nor lapse of time, will prevent a party from attacking and overthrowing a void judgment, and the proceedings based thereon, unless a limit as to time is fixed by positive statute. In such case, third parties have no right to rely upon the judgment or proceedings. For manifest reasons the same rule can not be applied to judgments that are regular upon their face, and voidable merely. Upon such, third parties have a right to rely; and hence upon the discovery of the fact that they have been procured by fraud upon the party, or upon the court, the injured party should move with reasonable promptness, and thus save third parties from injury. Such we understand to be the well settled doctrine of the books. We can not extend this opinion by giving the result of an examination of all of the cases cited by counsel. We take the time only to refer to the cases of *Pollard* v. *Wegener*, 13 Wis. 569; *Shaefer* v. *Gates*, 2 B. Mon. 453; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Pennoyer* v. *Neff*, 95 U. S. 714; and to say that in each of them the thing lacking to make a valid judgment is apparent upon the record. After a careful consideration of the arguments advanced, and a re-examination of the questions involved in the case, we are unable to reach a conclusion different from that stated in the opinion. The petition for a rehearing is therefore overruled.

Filed February 23, 1884.

| | |
|---|---|
| 91 | 44 |
| 125 | 597 |
| 126 | 426 |
| 91 | 44 |
| 140 | 471 |
| 91 | 44 |
| 148 | 551 |
| 91 | 44 |
| 164 | 451 |

No. 10,546.

## Helm et al. *v.* The First National Bank of Huntington et al.

Injunction.—*Trial.*—*Jury.*—A court of equity only can give relief by injunction, and in a suit therefor there is no right to a jury trial. R. S. 1881, sections 65, 409.

Same.—*Judgment.*—*Counter-Claim.*—*Change from Judge.*—*Waiver.*—A. sued B. and C. to enjoin the collection of a judgment held by C. against A. and B., alleging nothing against B., whose interests were identical with A.'s. Issues were made by C., which were tried and found for C. without any default of B. or pleadings by him, though he was served with process. In vacation, pending a motion by A. for a new trial, B. filed a counter-claim praying a decree declaring the judgment satisfied.

*Held*, that B.'s counter-claim came too late to give him any standing in court or even to entitle him to apply for a change of venue from the judge, and that it was properly struck out.

*Held*, also, that A., having gone to trial without the default or answer of B., could not complain, having thereby waived such proceedings.

New Trial.—*Surprise.*—*Evidence.*—*Statute Construed.*—A plaintiff, being at liberty to suffer a nonsuit, can not in any case obtain a new trial on the ground that he was surprised by the defendant's evidence, notwithstanding section 559, R. S. 1881, and this is clear where the evidence creating the surprise, though inadmissible, was suffered to go in without objection or any motion to strike it out.

Bill of Exceptions.—*Record.*—Interrogatories, filed with a pleading and stricken out by the court, are out of the record for all purposes until brought in by bill of exceptions or proper order.

From the Huntington Circuit Court.

*J. C. Branyan, C. W. Watkins, M. L. Spencer, B. M. Cobb* and *B. F. Ibach*, for appellants.

*W. H. Trammel, T. L. Lucas, J. T. Alexander* and *J. M. Hatfield*, for appellees.

Hammond, J.—On March 22d, 1878, the appellants Williams and Helm, the former as principal, the latter as surety, executed their note to the appellee, the First National Bank, in the sum of $600, with attorney fees, payable ninety days after date. On the 22d day of May following, Williams executed his note to said bank for $3,200, payable one day after

date, and secured the same by his mortgage on real estate in Wells county. The bank obtained judgment, December 31st, 1878, in the Huntington Circuit Court, against Williams as principal and Helm as surety on said note of $600, for the full amount thereon due, with attorney fees and costs. The bank, also, September 19th, 1879, obtained judgment and foreclosure against Williams in the Wells Circuit Court, for the full amount, principal, interest, attorney fees and costs, of said note of $3,200. The land described in the mortgage was sold under said foreclosure at sheriff's sale to the bank, October 25th, 1879, for the full amount of the judgment. After the expiration of a year, there being no redemption, a sheriff's deed was executed to the bank for the land. In July, 1881, the bank caused an execution to issue on the judgment rendered against Williams and Helm on said note of $600. The appellee, the sheriff, levied this execution upon certain personal property of the appellant Helm. Helm then commenced the present action against the bank and the sheriff, making Williams also a party defendant, to enjoin the collection of the judgment, except costs and attorney fees, which he paid, claiming in his complaint that the note for $3,200, given by Williams to the bank, covered all of Williams's indebtedness to the bank at that time, including the debt evidenced by said note of $600, and that the payment of said note of $3,200, by the foreclosure of the mortgage securing it, and the purchase at sheriff's sale of the land embraced in the mortgage, operated as a satisfaction of the judgment rendered on said note for $600, except the attorney fees and costs, which were paid, as aforesaid, to the sheriff, on the execution, before the commencement of the action.

The bank and the sheriff answered Helm's complaint by the general denial. Williams, though duly served with process, did not answer, nor was any rule taken against him to answer.

It will thus be seen that the only question in the case was

one of fact, namely, whether or not the note for $3,200 included the debt evidenced by the note for $600.

The case was tried by the court, as between Helm, the bank, and the sheriff, resulting, on the last day of the October term, 1881, in a finding for the defendants. Helm moved for a new trial, and had leave to file written causes therefor on the first day of the next term. In vacation, preceding the next term, Williams filed his cross complaint against the bank, asking a decree declaring the judgment rendered on the note for $600 satisfied. The grounds upon which he asked this relief were the same as those stated in the complaint of Helm. On the first day of the following term Helm filed his written causes for a new trial. On the 3d day of the term Williams moved on affidavit for a change from the judge. His motion was overruled. He excepted. The court also, at the same time, dismissed his cross complaint, to which he excepted. On the 23d day of the term Helm's motion for a new trial was overruled. He excepted. Judgment was rendered against him for costs. He and Williams appealed to this court, making separate assignments of errors. We will first consider the case as to Helm. The error assigned by him is the overruling of his motion for a new trial. His motion for a new trial alleged as causes the following:

1st. The finding of the court is contrary to law.

2d. That the finding of the court is contrary to the evidence.

3d. That the finding of the court is not sustained by sufficient evidence.

4th. Because the court erred in trying this cause without an issue as to Oliver Williams, the principal judgment debtor.

5th. Because the court erred in refusing plaintiff the right of trial by jury as to the questions of fact in this cause.

6th. Because plaintiff was taken by surprise in the evidence on the trial, by the testimony of William McGrew, Thomas L. Lucas and James B. Kenner, witnesses, produced by the defendant, the First National Bank.

7th and 8th. Because the court struck out the third and fourth interrogatories filed with the plaintiff's complaint and propounded by the plaintiff to the bank.

Upon the part of the bank there was direct and positive evidence that the debt evidenced by the note for $600 was not included in the note for $3,200. While there was, in behalf of Helm, evidence that such debt was included in the last note, we can not, under the well settled rule of this court in such case, disturb the finding of the trial court upon the question of fact, about which the evidence was conflicting. This disposes of the first, second and third causes for a new trial.

As to the fourth cause for a new trial, we think that the appellant Helm can not complain because of the trial without an issue as to Williams. Williams was jointly interested with him in having a decree of satisfaction as to the judgment rendered against both on the note for $600. He should have been joined as plaintiff, unless he refused to so join, in which case he might have been made a party defendant, but the reason for making him a party defendant should have been stated in the complaint. Section 269, R. S. 1881. This was not done, and the complaint, therefore, made no cause of action against Williams. There was nothing for him to answer. Besides, if any cause of action had been stated against him, Helm, after going to trial without objection, and without requiring Williams to answer, thereby waived such answer and the objection after the trial came too late. Buskirk's Practice, 286; 1 Works Practice, section 736.

The fifth ground for a new trial requires us to decide whether this was a case in which either party was of right entitled to have a trial by jury. The appellant Helm, at the proper time, demanded that the issue of fact should be tried by a jury, but this being refused, he properly saved the question in his bill of exceptions.

Section 409, R. S. 1881, provides that "Issues of law and issues of fact in causes that, prior to the 18th day of June,

1852, were of exclusive equitable jurisdiction, shall be tried by the court." The granting of injunctions belongs exclusively to the equitable jurisdiction of courts, and cases of this kind, before the adoption of the code of June 18th, 1852, were tried by the court without a jury. It is true, that the court might then, as now, in cases triable by it, "in its discretion, for its information, * cause any question of fact to be tried by a jury;" but a party could not then, and can not now, demand as of right a trial by jury in such cases. *Evans* v. *Nealis*, 87 Ind. 262. Section 20 (section 65, R. S. 1881), of article 1, of the Constitution, which provides that "In all civil cases, the right of trial by jury shall remain inviolate," applies only to actions that before the adoption of the Constitution were triable by jury, and has no reference to cases falling within the chancery jurisdiction of courts. *Lake Erie, etc., R. R. Co.* v. *Heath*, 9 Ind. 558; *Baker* v. *Gordon*, 23 Ind. 204; *Dronberger* v. *Reed*, 11 Ind. 420; *Norristown, etc., Turnpike Co.* v. *Burket*, 26 Ind. 53; *Hymes* v. *Aydelott*, 26 Ind. 431; *Evansville, etc., R. R. Co.* v. *Miller*, 30 Ind. 209; *Allen* v. *Anderson*, 57 Ind. 388.

We think there was no error in refusing a trial by jury in this case.

In his sixth cause for a new trial, the appellant Helm alleged that he was surprised by the testimony of William McGrew, Thomas L. Lucas and James B. Kenner, witnesses, who, at the trial, testified in behalf of the appellees. The occasion of the alleged surprise happened in this way: Some time before the trial, the deposition of the appellant Williams had been taken before an officer in Huntington, Indiana, to be used in the case of *First National Bank of Huntington* v. *Pfeifer et al.*, pending in one of the courts in the State of New York. In the trial of the case at bar in the court below, Williams was introduced as a witness for the appellant Helm, and testified that the debt for which the note of $600 was given was embraced in the subsequent note of $3,200.

In his cross-examination he stated that he did not remember when his deposition was taken, whether he was asked if the note for $600 was included in the note and mortgage for $3,200; but that if he was asked this question, his answer was that it was not so included.

McGrew, Lucas and Kenner, witnesses for the appellees, directly contradicted Williams upon this point, each one testifying that he was present at the taking of the deposition, and that Williams therein testified that the note for $600 was *not* included in the note and mortgage for $3,200.

In support of the sixth cause for a new trial, appellant Helm filed therewith a certified copy of the deposition in question, showing that the three witnesses above named were mistaken, and that no such evidence as they testified to was given by Williams in said deposition. Said appellant also filed his own affidavit, to the effect that the copy of the deposition so filed was correct; that he was injured by the testimony of the three witnesses, and that he could not have guarded against the same, for the reason that at the time of the trial the deposition was in the city of Buffalo, New York.

A new trial may be granted for "Accident or surprise, which ordinary prudence could not have guarded against." Sec. 559, R. S. 1881. But it seems to be quite well established that a plaintiff is not entitled to a new trial on account of surprise at any evidence given for the defendant, for the reason that he has it in his power to dismiss his case, without prejudice to his rights, and commence another suit. *Cummins* v. *Walden*, 4 Blackf. 307; *Atkisson* v. *Martin*, 39 Ind. 242. In the former case, BLACKFORD, J., delivering the opinion of the court, said: "It is a general rule, indeed, that a plaintiff, after a verdict against him, can have no claim to a new trial on account of his having been surprised by any evidence of the defendant. If the plaintiff finds himself unprepared to meet the defendant's evidence, he always has it in his power to suffer a nonsuit, which will leave him at liberty to sue again

for the same cause of action. It would be giving the plaintiff too great an advantage, to permit him to take the chance of a verdict, and when it is lost, to relieve him from the verdict and give him a chance with another jury, merely because the evidence against his claim was stronger on the first trial than he expected it would be."

As a court may, for good cause shown, at any stage of the proceedings, continue an action (section 411, R. S. 1881), it is probable that the appellant Helm, after the testimony of the three witnesses, could, on proper application, have had a continuance to procure an authenticated copy of the deposition. *State, ex rel.*, v. *Bottorff*, 82 Ind. 538. And it may, also, be suggested that the evidence complained of could not properly have been received, had he objected to it. The deposition itself would have been the best evidence of what Williams testified to when it was taken. Parol evidence of the contents of such deposition was not admissible except by the appellants' acquiescence. We must presume that the court would have excluded it, had he objected to it, or stricken it out after its admission, had he made a motion therefor. From the record it appears that the evidence was received without his objection, and that when so received, he took no steps to get rid of it. We do not think a new trial should be granted to correct the effect of adverse testimony, which would not have been admitted, or, if admitted, would have been stricken out had the party against whom it was offered insisted upon the application of familiar rules of evidence.

The seventh and eighth causes for a new trial present no question for the consideration of this court. The interrogatories stricken out are not in the record, by order of the court or by bill of exceptions. *Klingensmith* v. *Reed*, 31 Ind. 389.

We think there was no error in overruling the motion of the appellant Helm for a new trial.

The appellant Williams has assigned as errors in this court the following:

Wells *v.* Morrison.

1. That the court erred in refusing to grant him a change from the judge.

2. That the court erred in dismissing his cross complaint.

As already shown his cross complaint was filed, and his motion for a change from the judge was made, after the trial of the case as between Helm and the appellees. We think he was too late with these proceedings, and that the action of the court in reference thereto was proper. Story Eq. Pl., section 395; *Gouverneur* v. *Elmendorf*, 4 Johns. Ch. 357; *Field* v. *Schieffelin*, 7 Johns. Ch. 250. We find no error in the record.

Judgment affirmed, at the appellants' costs.

Filed October 18, 1883.

---

No. 10,440.

91 51
126 365

WELLS *v.* MORRISON.

91 51
f168 266

CONTRACT.—*Consideration.*—*Pleading.* — *Instruction.* — *Practice.*—To a suit against A. and B. upon their written promise to pay a certain sum of money, A. answered (1) that the plaintiff accepted from him a sum less than the amount due, in satisfaction of his promise, and gave him a written release therefrom; (2) that being insolvent and largely indebted to one C., he had delivered to him as security certain bonds, which he had sold to apply on such indebtedness, but, by an agreement between C. and the plaintiff, C. paid to him a certain sum in full satisfaction of A.'s liability on the promise sued on, and in writing released him from all liability. Reply (1) that the release was obtained by false and fraudulent representations; (2) that, by reason of such false and fradulent representations, there was a failure of the consideration of the release.

*Held*, that the replies were sufficient on demurrer.

*Held*, also, that the facts averred showed a failure of consideration for the release.

*Held*, also, that B. not having been served with process, and not having appeared to the action, no error was committed in instructing the jury that "they had nothing to consider as to B."

PRINCIPAL AND AGENT.—*Evidence.*—*Letters.*—Letters written by an agent in reference to the matter in controversy are legitimate evidence against his principal, in favor of the adverse party.

Wells *v.* Morrison.

INSTRUCTIONS.—*Statement of General Rules.—Exceptions.*—If a party desires that the exceptions to a general rule of law be stated in an instruction to a jury, he should, in general, ask the court so to do, but where the court states a legal proposition, and that the same is the rule "except in cases I shall hereafter enumerate," if the court afterwards undertakes to enumerate the exceptions, he must state them all, and for a failure so to do the judgment will be reversed.

PAYMENT.—*Smaller for Larger Sum Due.—Negotiable Instrument.*—In general, the payment of a smaller sum will not satisfy a larger, but a negotiable security for a smaller amount, given and accepted in satisfaction of a larger debt, will discharge it, and a check upon a bank, payable to bearer, is such a negotiable security.

From the Howard Circuit Court.

*N. R. Linsday* and *J. W. Kern*, for appellant.

*M. Bell, W. C. Purdum, H. Y. Morrison*, ——. *Morrison*, and *J. N. Sims*, for appellee.

BICKNELL, C. C.—The appellee brought this action against the appellant and one Adams, upon a written promise, of which the following is a copy.

"FRANKFORT, INDIANA, November 20th, 1876.

"Received of H. Y. Morrison five bonds of the Frankfort and Kokomo Railroad Company, of the value of one thousand dollars each, which we agree to pay for within one hundred days from date at 55 per cent. of their par value, or return the same within ten days thereafter, with accrued interest to date of payment, as per coupons attached.

(Signed) "ADAMS & WELLS."

The complaint averred that the defendants were partners, and made the promise by their firm name of Adams & Wells; that the par value of said bonds was $1,000 each; that they bore interest at 7 per cent., payable semi-annually; that they were never returned to plaintiff; that on December 4th, 1877, defendant Wells paid plaintiff on said promise $2,000; that there remained due thereon $1,500, for which judgment is demanded.

The defendant Adams was not served with process, and as to him the cause was continued for process.

The defendant Wells filed an answer in four paragraphs, to wit:

1st. The general denial.

2d. Payment before suit brought.

3d. That about December 4th, 1877, defendant and Adams owed more than they were able to pay, as the plaintiff well knew, and that plaintiff, in view of "the great probability of the entire insolvency of said Wells & Adams," accepted from Wells, by the hand of Calvin Cowgill, $2,000 in satisfaction of said promise so far as this defendant is concerned, and then and there gave this defendant a written release from said promise, of which the following is a copy:

"I hereby release and relinquish all claims against said Wells upon said obligation, this release being made for the purpose of discharging him from any further liability to me, on account of said contract or the bonds named herein." Wherefore, etc.

4th. That on December 4th, 1877, Calvin Cowgill, one of the creditors of this defendant, paid the plaintiff $2,000, which he agreed to accept in full satisfaction of the promise sued on, as shown by the following written receipt and release, to wit:

"WABASH, IND., December 4th, 1877.

"In consideration of $2,000 this day paid me by A. G. Wells, upon the obligation, a true copy of which is as follows:"

Then follows a copy of the promise sued on, with an endorsement thereupon, to wit:

"I hereby certify that I, as agent of Adams & Wells, have received the above named bonds from H. Y. Morrison, and that they are numbered No. 46, 47, 154, 155 and 156, and that the last coupons detached matured January 1st, 1876. Dated November 20th, 1876. (Signed) C. COWGILL."

Then followed a copy of the same release pleaded in the third paragraph of the answer. The fourth paragraph further avers that said $2,000 was paid and accepted in satisfaction of the said liability of the defendant, the plaintiff knowing that said defendant was insolvent; that said defendant was

then insolvent; that said defendant was largely indebted to said Cowgill, and had delivered to him, as security for such indebtedness, certain railroad bonds, and among them nineteen railroad bonds of the par value of $1,000 each, secured by a mortgage of the Frankfort and Kokomo Railroad Company, which bonds said Cowgill, by consent of said defendant, had sold for $4,800, to be applied on said indebtedness, and that before the application thereof to said indebtedness, said Cowgill had proposed to the plaintiff that if he would accept the same in full satisfaction of the liability of the defendant upon the obligation sued on, he, Cowgill, would pay him $2,000 thereof, and that the plaintiff, in view of the insolvency of the defendant and said Adams, accepted and received said $2,000, and in writing as aforesaid did discharge the defendant from all further liability on the promise sued on. Wherefore, etc.

The plaintiff demurred to each of said third and fourth paragraphs of answer. Said demurrers were overruled.

The plaintiff replied in six paragraphs, to wit:

1st. A general denial of the second, third and fourth paragraphs.

2d. Admitting the execution of said release, but averring that it was procured by the fraud and deceit of the defendant and his attorney, the said Calvin Cowgill, who falsely and fraudulently represented to the plaintiff, that one Comstock had agreed in writing with the defendant, that if he would pay plaintiff $2,000 on the promise sued on, he, Comstock, would pay the plaintiff the residue, and that if plaintiff would execute said release, defendant would aid plaintiff to enforce said contract of Comstock, and would deliver to plaintiff said contract or a copy of it; that plaintiff, relying on said false representations, executed said release; that said defendant never had any such contract with Comstock, and although often requested would not furnish said plaintiff such contract, nor a copy thereof, and would not aid plaintiff in enforcing it, and still refused so to do; that the said residue

is still unpaid, and that all the allegations of said third and fourth paragraphs of answer, not herein expressly admitted, are denied. Wherefore, etc.

3d. The third paragraph of reply does not differ substantially from the second paragraph.

4th. The fourth paragraph of reply avers that said release was without any consideration, and denies all the material allegations of the third and fourth paragraphs of answer, which are not therein expressly admitted or denied.

5th. The fifth paragraph of reply avers that defendant, on an application to set aside a default, had filed in court an affidavit that he had paid and caused to be paid to the plaintiff the entire amount due, whereby said defendant is estopped from averring that any other person paid said moneys.

6th. The sixth paragraph of reply pleads the same facts stated in the second and third paragraphs, as a failure of the consideration of said release. This paragraph also denies all the allegations of said third and fourth paragraphs of answer which are inconsistent with the allegations of the complaint and are not expressly admitted or denied.

Demurrers to the second, third and sixth paragraphs of the reply were overruled. A demurrer to the fifth paragraph of the reply was sustained.

The issues were tried by a jury, who returned a verdict for the plaintiff for $1,525.

A motion of the defendant for a new trial was overruled; judgment was rendered upon the verdict, and the defendant appealed.

He assigns errors as follows:

1. Overruling the demurrers to the second and third paragraphs of the reply.

2. Overruling the demurrer to the sixth paragraph of the reply.

3. Giving the jury instructions numbered from one to ten, inclusively.

4. Refusing to give the jury instructions asked for by the appellant, numbered from one to nine, inclusively.

5. Overruling the motion for a new trial.

The first specification in the assignment of errors being joint, it is not available, if either the second or third paragraph of the reply is good.

The second paragraph was good. The answer averred a release. The second paragraph of reply admitted the execution of the release, but alleged that it was obtained by the false and fraudulent representations of the defendant, that he had a written contract with one Comstock, who was bound thereby to pay the residue of the plaintiff's claim; that, in fact, there was no such contract; that defendant had agreed to deliver the same to the plaintiff and aid him in collecting from Comstock the residue of his claim, but had failed so to do. The plaintiff might well agree to take $2,000 and release the defendant in consideration of obtaining the existing written agreement of Comstock to pay the residue.

There was, therefore, no error in overruling the demurrer to the second and third paragraphs of the reply.

The second specification of error asserts the insufficiency of the sixth paragraph of reply, which stated substantially the same facts last mentioned as a failure of the consideration of the release. There was no error in overruling the demurrer to the sixth paragraph of reply. *Kingan* v. *Gibson*, 33 Ind. 53; *Arnold* v. *Cord*, 16 Ind. 177; *Wambaugh* v. *Bimer*, 25 Ind. 368; *Rice* v. *Loomis*, 28 Ind. 399.

Here the defendant's alleged representations were not in reference to something subsequently to be procured, but as to a valuable consideration which he stated he then had.

The third and fourth specifications are not proper in an assignment of errors; they belong to the motion for a new trial. *Harris* v. *Boone*, 69 Ind. 300.

As to the fifth specification in the assignment of errors, twelve reasons were assigned for a new trial. The first three allege that the verdict was not supported by and was contrary

to the evidence, and is contrary to law; but if the jury believed the testimony of the appellee, which they had a right to do, then these reasons amount to nothing. His testimony tended to sustain the verdict.

The fourth, fifth, sixth, seventh and eighth reasons for a new trial object to the admission in evidence of certain letters written by Calvin Cowgill to the plaintiff. But when these letters were written Mr. Cowgill was the agent of the defendant. The first of the letters expressly recognizes the indebtedness in controversy, states that it is nearly or quite due, and that the defendant desires an extension of time. All of the letters evidently relate to the indebtedness, as an existing obligation, and we think there was no error in admitting them. Whatever is said or written, by a party or his agent, in reference to the matter in controversy, is legitimate evidence for the other party.

The ninth reason for a new trial objects to the admission in evidence of a certain contract between the defendant and Comstock, by which it appeared that the defendant had lately transferred to Comstock a large amount of railroad securities, for which Comstock had agreed to pay him a large sum of money. The objection to this was that the contract was irrelevant and immaterial; but this contract and the preliminary evidence in relation thereto had a tendency to throw light upon the question whether the defendant was solvent or insolvent, which was one of the questions raised by the pleadings. There was no error in admitting this testimony.

The tenth reason for a new trial objects to the admission in evidence of a certain conversation between the plaintiff and Comstock. The plaintiff, without objection, had, on re-examination, testified as follows: "When I told Comstock what had occurred between Wells and me at Wabash, in regard to Wells giving me the benefit of that contract he held against Comstock to secure the payment of the balance of my bond contract, he said the contract did not bind him to pay it, and he was not going to do it." The witness then stated that

Comstock finally agreed to get him a conveyance of part of a certain lot No. 10, but instead of so doing had the entire lot conveyed to Emily G. Comstock, and that witness then asked him why he did it. The defendant objected to the witness answering that question because "it was not a proper re-examination, and was hearsay," but the court overruled the objection, and the witness testified: "He answered me, and said, 'Wells was owing him some, and he thought he had a right to take care of himself first, and that was what he had been doing.'" We think there was no substantial error in admitting this evidence. It tended to prove a part of the substance of the plaintiff's replies. It detailed a matter connected with the refusal by Comstock to comply with the plaintiff's demand. It was substantially a part of that refusal.

The eleventh reason for a new trial is that the court erred in giving the jury instructions from one to ten inclusive, and in giving each of said instructions.

These instructions are contained in a bill of exceptions, which states that, after the close of the argument, the court, of its own motion, gave the jury instructions from one to ten inclusive, which were in these words, to wit:

Upon this statement the instructions given in the bill of exceptions were all the instructions given by the court of its own motion:

"1. This suit is brought by the plaintiff to recover an amount of money upon a written contract alleged to have been executed by the defendants Allen G. Wells and Coe Adams, a copy of which is set forth in the complaint. There having been no service as to the defendant Adams, the cause is continued as to him; you, therefore, have nothing to consider as to him. The defendant Wells, however, appears and answers the complaint in several different paragraphs, the first of which is a general denial, the effect of which is to impose upon the plaintiff the burthen of proving, by a preponderance of the evidence, all the material allegations of his complaint."

The appellant claims that the court ought not to have told

the jury that they "had nothing to consider as to Adams," but the substance of it is that although the jury had to determine the preponderance of the evidence as to the issues between the plaintiff and Wells, they had nothing to consider as to Adams. This was right. The testimony might affect the plaintiff and Wells, but could not be considered as to Adams, because he was, practically, out of the case.

"2. The material allegations necessary for the plaintiff to prove, to enable him to recover in the first instance, and under this issue alone, are, first, the introduction of the written instrument sued on, the delivery of the bonds mentioned in the written instrument by the plaintiff to the defendants, the failure of the defendants to return the same, their par value and the rate of interest."

The objection made to this is that it assumes the existence of the written instrument, and that the bonds had some par value. There is nothing in these objections, the general denial being pleaded without oath. The execution of the writing sued on was admitted, but its introduction in evidence was necessary. The court told the jury, in substance, that, under this issue, the written instrument sued on must be introduced in evidence, and that it must be shown what was the par value of the bonds. Here was nothing unwarrantably assumed, and nothing likely to mislead the jury.

"3. The defendant, in his second paragraph of answer, admits the execution of the written contract sued on, but says that before the commencement of this action the defendant Wells fully paid and satisfied said claim. This being denied by the plaintiff, the burthen of proving this issue by a preponderance of the evidence is upon the defendant. Under an answer of full payment a partial payment may be proved and allowed. A payment is the fulfilment of a promise, or the performance of an agreement; it may be a full payment or it may be a partial payment. And should you believe from the evidence that the defendant paid the whole of the money due on said contract, then your finding should be for the defend-

ant; but if you should believe from the evidence that the defendant only paid a part of the amount due, then your finding should be for the plaintiff in the amount of the principal and interest due the plaintiff and remaining unpaid, unless you should believe from the evidence that the defendant has made out some other and different one of his defences."

This instruction stated the general rule correctly in reference to the issue arising upon a plea of payment, but told the jury that such rule would not apply to other defences.

The appellant objects to it, that it does not state certain exceptions to such general rule, and, therefore, does not contain a full statement of the law applicable to such a plea; but where, as in this case, an instruction stated the general rule correctly, if the appellant thought it was not full enough, and desired exceptions to be stated, he ought to have asked for them, and taken care, if they were refused, that the record was properly made, so that under the rules of this court the refusal could be considered. *Adams* v. *Stringer*, 78 Ind. 175; *Hatton* v. *Jones*, 78 Ind. 466; *Mobley* v. *State, ex rel.*, 83 Ind. 92; *Bishop* v. *Redmond*, 83 Ind. 157.

"4. The defendant, for a third and further defence, avers that the defendants Adams & Wells were largely and heavily indebted, and in failing and insolvent circumstances, unable to meet and pay their debts; that in view of such insolvency and inability to pay said debts, Morrison received in full discharge of his debt $2,000; and in the fourth paragraph of answer the defendant avers the same facts as to their insolvency and inability to pay their debts, and says that one Calvin Cowgill, paid to said plaintiff $2,000 out of funds under his control, and held by him as his security, in consideration of which payment by said Cowgill, the plaintiff agreed to release the defendant from all further liabilities, and that in consideration of such payment, as aforesaid, the plaintiff executed his written release, an alleged copy of which is filed with said third and fourth paragraphs of answer. These paragraphs of answer are denied by the plain-

tiff, thereby casting the burthen of proof of these issues upon the defendant."

The substance of this is, that the plaintiff's denial of the third and fourth paragraphs of the answer put the burden of proving those answers upon the defendant. The general tenor of the answer was sufficiently stated.

"5. A payment by a debtor of a less amount than is due the creditor can not operate as a satisfaction of the debt, nor does it constitute a sufficient consideration to base a valid release upon, except in cases I shall hereafter enumerate. The release in this case is a written contract upon the part of the plaintiff, by which he agrees to discharge the defendant Wells from all further liability on Adams & Wells' indebtedness to him, and in order that such release shall bind the plaintiff Morrison, it must have been based upon a valuable consideration; and the payment of only a part of the amount due him by Wells would not constitute a consideration for the written release, and such written release is not binding upon him unless there is some other or different consideration for the same.

"6. If, however, Adams & Wells were in insolvent circumstances at the time, being unable to pay their debts, and the said Morrison knew this fact, and for the purpose of securing a portion of the debt, sharing in common a loss with the other creditors, received and accepted $2,000 in full satisfaction of his debt, and said $2,000 constituted and was the only consideration for the execution of said release, then and in that case he would be bound thereby and could not recover in this case.

"7. If you find also from the evidence that the defendant Wells had placed in the hands of Cowgill certain railroad bonds, to indemnify him against loss on account of being Wells' security, and that Cowgill had, with Wells' consent, converted a portion of said bonds into cash for the purpose of paying the same on the debts for which he was so liable as said Wells' security, and had said money in his own hands and

under his control, and that while he, Cowgill, so controlled said money, he agreed with the plaintiff, Morrison, that if he would release the defendant Wells from all liability on account of the obligation sued on, he would pay him $2,000 of the money he so controlled and held, and that said Morrison had knowledge, at the time he accepted the same, that the said Cowgill so held said money as his security, and that said Cowgill did pay the plaintiff said sum of money in pursuance of said contract, and that Morrison so accepted and received the same, then your finding should be for the defendant, unless you should believe from the evidence that said release was procured by the fraud and deceit of said defendant Wells."

These last three instructions may be considered together. In the fifth instruction, the court tells the jury the general rule that payment of a less sum will not satisfy a greater sum already due, "except in the cases I shall hereafter enumerate." After making this statement, the court was bound to enumerate all the exceptions to which the evidence was applicable; this the court failed to do. It appeared in evidence that the $2,000 was paid by a check of which the following is a copy:

"$2,000. WABASH, IND., Dec. 4, 1877.

"*First National Bank:*

"Pay to H. Y. Morrison, or bearer, two thousand dollars in currency. (Signed) C. COWGILL."

Such a check must be viewed as an inland bill of exchange. *Glenn* v. *Noble*, 1 Blackf. 104. In its quality of negotiability under the law merchant, it exactly resembles a bill of exchange. Byles Bills, 13; Chitty Bills, 10th Am. ed., p. 511. It is one of the exceptions to the general rule laid down by the court in its instruction No. 5, that where the less sum is paid by a check, or other instrument negotiable by the law merchant, it may operate as a discharge of the entire indebtedness. 2 Parsons Contracts, 6th ed., p. 619; *Sibree* v. *Tripp*, 15 M. & W. 23; *Goddard* v. *O'Brien*, L. R. 9 Q. B. 37. So, in *Fensler* v. *Prather*, 43 Ind. 119, 122, this court said: "A negotiable se-

curity for a smaller amount given and accepted in satisfaction of a larger debt will operate effectually in discharge of it;" the court having undertaken to state the general rule and the exceptions, and having omitted a very important exception to which the evidence was applicable. In this respect the charge was erroneous. It must have led the jury to believe that there were no exceptions to the general rule stated, except those afterwards mentioned by the court in instructions Nos. 6 and 7.

The remaining instructions given by the court, Nos. 8, 9 and 10, contain nothing in relation to any exceptions to the general rule stated in instruction No. 5. They relate exclusively to other matters. If the appellant desired any further statement to be added to instruction No. 9, to make it more complete, he should have asked for it. We find no substantial error in instructions Nos. 8, 9 and 10. For the error aforesaid in the instructions of the court, the judgment must be reversed. It is therefore unnecessary to consider the instructions refused by the court.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Filed June 29, 1883.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The petition claims that the court below, after stating the rule that a larger sum is not discharged by the payment of a smaller sum, except in certain cases which the court would enumerate, did not err in failing to mention one of such exceptions, to wit: That where the payment, made and accepted in satisfaction, is by a negotiable check, it will discharge the larger sum.

Upon this proposition, the authorities cited in the principal opinion, show that the court below did err.

The appellee argues the case as if the plea of payment stood

alone, but the fourth defence expressly avers that the money was paid and accepted in full satisfaction of the entire promise.

A verdict, in accordance with the weight of the evidence and with justice, will not be set aside because of error in the instructions, but here the error of the court embraced the controlling feature of the case. It undoubtedly misled the jury, and it was followed by a verdict which, we can not say, was in accordance with the weight of the testimony, nor with justice.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed October 11, 1883.

---

91 64
181 288
91 64
141 612
91 64
155 425
91 64
f171 556

No. 9810.

## POWELL ET AL. *v.* BUNGER.

HIGHWAY.—*Action for Obstructing.—Who May Maintain.—Special Injury.—Demurrer.—Private Way.—Easement.—Damages.*—On demurrer to a paragraph of a complaint for obstructing a public highway,

*Held*, that a person may not maintain such action where the obstruction is an injury to him only in the same manner that it is to all other citizens.

*Held*, also, that a person can maintain such action only where the obstruction causes him special injury to his person, trade or estate. The *gravamen* of an action for obstructing a private way is the obstruction; in case of a public way it is the special injury to the plaintiff.

*Held*, also, that to be prohibited by one, through whose lands a public highway passes, from passing upon the way, and to cease to use it, or refrain from using it, because of such prohibition, and because such person has wrongfully obstructed it, will not constitute a special injury, or give a right of action for loss or inconvenience arising from going a more circuitous and difficult way. WOODS, C. J., dissents.

SAME.—*Verdict.—Judgment.—Error.—Supreme Court.—Petition for Rehearing.*—Complaint in two paragraphs for obstructing a highway, the first alleging an obstruction by defendant of the plaintiff's private way, and the second the obstruction of a public highway; the first asked that the plaintiff's way might be established, his right thereto quieted, the defendant enjoined, and for damages; the second asked for damages and an injunction; a demurrer was overruled to the second; the case was put at issue, trial by jury had, with a general verdict for plaintiff for nominal damages, and judgment rendered thereon for such damages, and enjoin-

ing defendants from molesting the plaintiff's use of the private way and also the highway; on appeal to the Supreme Court by defendant, the ruling of the lower court on the demurrer is held to be error, and judgment reversed; appellee then files petition for a rehearing, alleging as reasons that the court should have reversed the judgment only so far as it was based on the second paragraph of the complaint, and should have affirmed it as to the first paragraph, offering to remit any recovery under the second paragraph, and asking the court to modify its judgment accordingly.

*Held*, on such petition, that the court could not make the modification asked without a rehearing.

*Held*, also, that the judgment could not be affirmed in part without examining and determining whether there is any other error in the record than that pointed out in the original opinion in the ruling on the demurrer.

*Held*, also, that the verdict was general, and the judgment thereon was based on each paragraph, and the Supreme Court can not sever the judgment so that it can say that a certain definite part thereof is affected by the error in ruling on the demurrer, and that the remainder is unaffected thereby.

PRACTICE.—*Certification of Record on Appeal Where there has been Change of Venue.*—A complaint in two paragraphs was filed in the Ohio Circuit Court; demurrer overruled to the second; thereupon a change of venue was taken to the Dearborn Circuit Court, where the cause was put at issue, tried, and verdict and judgment rendered for the plaintiff; defendant appealed; the record was made out by the clerk of the D. C. C. pursuant to the written instructions of appellant, under section 649, R. S. 1881; the record does not contain the certificate of the clerk of the O. C. C., which was appended to the transcript filed in the D. C. C. on change of venue, nor did appellant's written direction instruct the clerk of the D. C. C. to certify such transcript from the O. C. C., nor does the clerk of the D. C. C. certify that the record sent up contains a transcript from the O. C. C. On petition by appellee for rehearing, in which it is objected that the ruling of the O. C. C. on the demurrer was not before the Supreme Court.

*Held*, that it was not necessary, in the written instruction to the clerk of the D. C. C., to designate those portions of the record as being parts of the transcript from the O. C. C.

*Held*, also, that appellee can not be permitted to say in the Supreme Court, for the purpose of maintaining his judgment rendered by the D. C. C., on change of venue, that there was no change of venue, without which change his judgment could not stand.

From the Dearborn Circuit Court.

*W. S. Holman* and *J. B. Coles*, for appellants.
*A. C. Downey* and *S. R. Downey*, for appellee.

BLACK, C.—This was an action commenced in the Ohio Circuit Court by the appellee against the appellants.

The complaint was in two paragraphs. The cause of action set forth in the first paragraph was the obstruction by the appellants of the appellee's private way from his lands through their lands, the denial of his right thereto by the appellants, their threat to continue the obstruction, and the consequent damage to the appellee, and impairment of the value of his said lands, the lands of all the parties being in Ohio county; and the appellee in this paragraph prayed that his said way might be established, and that his right thereto might be quieted, that appellants might be enjoined from obstructing the way, and that appellee might recover damages and have other proper relief.

The second paragraph alleged the existence of a public highway through and over the lands of the appellants in said Ohio county, for all the citizens of said county to go, return, pass and repass, on foot, with horses, wagons, carriages and other vehicles, at all times, of their free will and pleasure; that the appellee was the owner of certain tracts of land at and adjoining said highway, and had lawful right to pass and repass on said highway, to carry off the products of his farm and for other purposes, and would have used said highway, as aforesaid, had it not been for the wrongful acts of the appellants; yet they, well knowing the premises, on, etc., wrongfully and unjustly, to injure the appellee and to prevent him from having the use of said highway, prohibited him from using said highway, and shut and closed and obstructed the same, from, etc., until the commencement of this action, and thereby prevented the appellee from using the same as he otherwise might and would have done; by means of which the appellee was obliged to and did use and travel a much more circuitous and difficult way, and for a much greater

distance than he otherwise would, and of right ought to have done, to his damage $500; that appellants threatened to continue to obstruct said highway and to prevent appellee from using the same, which would work great and irreparable damage to him and to his said lands; and he asked judgment for $500 damages, and that appellants might be enjoined, etc.

A demurrer to the second paragraph of the complaint, for want of sufficient facts, was overruled.

Issues were formed, and the venue was changed to the Dearborn Circuit Court, where a trial by jury resulted in a general verdict for the appellee, with nominal damages, and judgment was accordingly rendered in his favor upon both paragraphs of the complaint.

The overruling of the demurrer to the second paragraph of the complaint, with other subsequent rulings, has been assigned as error; and as that paragraph must be held insufficient, other questions discussed by counsel need not be decided.

A person may not have an action for the obstruction of a public easement, which is an injury to him, only in the same manner that it is an injury to all other citizens; but he may have his action for a special injury to him in his person, trade, or estate, occasioned by such a nuisance.

In an action for an obstruction of a private way, the gist is the obstruction, the deprivation of the right of way; in an action for an obstruction of a public way, the *gravamen* is the special damage to the plaintiff.

These are very familiar general principles, but it is not always easy to distinguish between an injury which the complainant suffers in common with the public, and an injury which is so peculiar to himself as to support a civil action, and the reported cases are not without disagreement.

There was no allegation in the second paragraph of the complaint that the appellee had abated any obstruction, or that when actually passing along the highway he had been delayed or turned back by any obstruction; but he appears

to have ceased to use the road because he was prohibited from using it by the appellants, and because they shut, closed and obstructed it; and thereafter he did not use this road or attempt to use it, so far as is shown by the complaint. He alleged that he would have used it to pass and repass, to carry off the products of his farm and for other purposes, and that the appellants, by prohibiting him from using the road, and shutting, closing and obstructing it, prevented him from using it, as he otherwise might and would have done, by means of which he was obliged to and did use and travel a much more circuitous and difficult way, and for a much greater distance than he otherwise would, and of right ought to have done. Because he had been prohibited and because an obstruction existed, he went a more circuitous and difficult way.

To be prohibited by one through whose lands a highway runs from passing upon the highway, and to cease to use or refrain from using the road because of such order, will not constitute a special injury from a public nuisance, or afford a right of action for the loss and inconvenience arising from going a more circuitous and difficult way; and while the injury to the public from an obstruction of a highway may rest in contemplation, there must be an actual hinderance to an individual to entitle him to his private remedy.

The way being a public one, every citizen had a right to pass and repass upon it, and to carry the products of his farm or other commodities upon it. This right is expressly alleged by the complaint as being in every citizen of the county, and it would be implied, without such averment, from the allegation that the road was a public highway.

We can not perceive how the appellee was specially injured, then, unless it was because of his proximity to the road obstructed. But one's right to use a public way for passage thereon is not affected by the distance of his residence therefrom. Proximity gives him no greater right of passage. All other citizens have as much right to travel on a public road as those who reside upon it or near it. Though the use may be more

valuable to him whose land is near the road or adjoins it, and for whom it is the most direct way to market, yet his injury arising from the obstruction of the highway is the same in kind as that suffered by others of the community, though it may differ in degree from that of others.

This is not a question of one's being deprived of necessary means of access to, or egress from, his property. See *Ross* v. *Thompson*, 78 Ind. 90; *Cummins* v. *City of Seymour*, 79 Ind. 491, 502 (41 Am. R. 618). The obstruction alleged is merely a public nuisance, which *per se* gives no right of private suit.

We will not lengthen this opinion by reviewing the authorities. Upon an examination of the cases, it will be found that the tendency is to restrict rather than to extend the right of civil action for obstruction of public easements. *Rose* v. *Miles*, 4 M. & S. 101; S. C., Bigelow L. Cas. Torts, 460; *Winterbottom* v. *Derby*, L. R. 2 Exch. 316; *Hughes* v. *Heiser*, 1 Binn. 463; *Blood* v. *Nashua, etc., R. R. Corp.*, 2 Gray, 137; *Houck* v. *Wachter*, 34 Md. 265; *Pierce* v. *Dart*, 7 Cow. 609; *Lansing* v. *Smith*, 8 Cow. 146; *McCowan* v. *Whitesides*, 31 Ind. 235; Angell High., sec. 285; Thomp. High. 346; Thomp. Neg. 341.

In such cases the individual is not without remedy, but, his injury being one shared by him with the public, the remedy must be one in which all citizens share, and must be pursued by a public prosecution. The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at appellees' costs, and the cause is remanded with instructions to sustain the demurrer to the second paragraph of the complaint.

WOODS, C. J., thinks the second paragraph good. It shows special damage to the appellee in that he was compelled to, and *did*, use and travel a more circuitous and difficult way. See *Board, etc.*, v. *White Water, etc., Company*, 2 Ind. 162; *City of Chicago* v. *Union Building Association*, 102 Ill. 379; S. C., 40 Am. R. 598.

**Filed March 14, 1883.**

## On Petition for a Rehearing.

Black, C.—It is urged by the learned counsel for the appellee, that if we were correct in holding that the court erred in overruling the demurrer to the second paragraph of the complaint, yet, inasmuch as the complaint sets forth two separate causes of action, we should have reversed the judgment only so far as it was based upon that paragraph, and should have affirmed it as to the cause of action stated in the first paragraph; and the appellee now offers to "remit" any recovery under the second paragraph, and asks this court to modify its opinion and judgment so as to reverse the judgment of the court below upon the second paragraph of the complaint and affirm it as to the first paragraph, in the event that the court shall not grant a rehearing.

We could not make such a modification without a rehearing. We could not affirm the judgment in part without examining and determining whether there is any other error in the record than that pointed out in the original opinion, beyond which it was not necessary to look.

But we did not fail on the original hearing to give attention, as requested then by the learned counsel for the appellee, to the question whether it would be proper to affirm in part and reverse in part. The verdict was general, and the judgment thereunder was general for the damages, and the defendants were enjoined from molesting, disturbing or obstructing the plaintiff in the full and free use of the private way mentioned in the first paragraph of his complaint, and also the highway mentioned in the second paragraph of the complaint, except as to certain swinging gates.

If the court erred in overruling the demurrer to the second paragraph of the complaint, that error was carried into the verdict and into the judgment. It can not be said that a judgment against the defendants on the first paragraph was any more authorized by the verdict than was a judgment against them on the second paragraph; and it would not have

been proper, while the verdict was permitted to stand, to set aside the judgment merely as to a part of that portion of the relief referable to the second paragraph of the complaint, such part being authorized by the verdict. The judgment can not be severed so that we can say that a certain definite part thereof is affected by the error, and that the remainder is unaffected thereby. Of course the appellee can not dismiss as to his second paragraph of complaint at this stage, and treating his offer to "remit" as in effect a request that a rehearing be granted, and that thereon the judgment be affirmed in part, it can not be accepted.

It is insisted that the action of the court in overruling the demurrer to the second paragraph of the complaint was not properly before us. The transcript for this appeal was made by the clerk of the Dearborn Circuit Court upon written directions of the appellants, as provided in section 558, code of 1852, which was the same as is section 649, R. S. 1881, being a transcript of so much of the record as the appellants so directed, with the written directions appended.

The ruling upon demurrer which we held to be erroneous was made by the Ohio Circuit Court. It is contended for the appellee that the ruling upon the demurrer is not legally shown, because the record brought to this court does not contain a certificate of the clerk of the Ohio Circuit Court appended to the transcript filed in the Dearborn Circuit Court on change of venue, and because in the written directions for a transcript the appellants did not direct the clerk to certify said transcript from the Ohio Circuit Court, and the clerk of the Dearborn Circuit Court does not certify that the record sent to this court includes a transcript from the Ohio Circuit Court.

The appellants did not direct the clerk to transcribe any transcript, but they did direct him to make a transcript of the papers filed in the Ohio Circuit Court and of the submissions and the rulings of the court, specifying the papers and rulings, and the clerk's certificate conforms to the written directions. It was not necessary to designate these portions of the

record as being parts of a transcript from the Ohio Circuit Court. This court will not be prevented by informality or omission in the appellants' written directions for a transcript, from looking into any portion of the record before it, as may become necessary to a proper decision of the cause. No question was made in the court below, and none is made here, as to the regularity and validity of the change of venue. Without a valid change of venue, the Dearborn Circuit Court would have had no jurisdiction of the subject-matter of the first paragraph of the complaint, relating to a private way in Ohio county. It can not be permitted to the appellee, who obtained a judgment in the Dearborn Circuit Court upon a change of venue from the Ohio Circuit Court, to say in this court, for the purpose of maintaining his judgment, that there was no change of venue, without which his judgment could not stand. He can not repudiate here the proceedings which led up to that judgment, which he recognized and took advantage from in the court below, and upon which his judgment in part depends. We can not ignore or reject a part of the proceedings in the Ohio Circuit Court and recognize and sustain another part thereof. What might be the proper result if the appellants had raised and presented a question as to the change of venue, need not be considered.

Counsel for the appellee have again argued the question of the sufficiency of the second paragraph of the complaint, but we are unable to reach a different conclusion thereon.

PER CURIAM.—The petition for a rehearing is overruled.

Filed October 13, 1883.

---

91 79
126 260

91 [illegible]
134 574

91 72
138 633

91 72
147 500

91 72
150 411

91 72
156 636

No. 10,550.

JONES ET AL. *v.* JONES ET AL.

PRACTICE.—*Bill of Exceptions.*—That time was given for the preparation of a bill of exceptions must appear by the record, otherwise than in the bill itself, else the bill filed during vacation will not be available.

SAME.—*New Trial.*—*Partition.*—A motion for a new trial in partition, to be available, must be made during the term at which the finding was made or verdict rendered, except in special cases or by consent. R. S. 1881, sections 561, 1188.

From the Madison Circuit Court.

*W. R. Pierse* and *C. B. Gerard*, for appellants.

*H. D. Thompson* and *T. B. Orr*, for appellees.

MORRIS, C.—The appellant and her husband, Silas J. Jones, commenced this suit against the appellees to quiet their alleged title to the east half of the southeast quarter of section 26, township 18 north, of range 6 east, in Madison county, Indiana. It is alleged that James Jones died seized of the land in controversy in 1860, leaving surviving him his widow, Penina Jones, and, among other children and heirs, John L. B. Jones, the father of the appellees; that John L. B. Jones died after the said James Jones, largely in debt; that his interest in said real estate had been sold to pay his debts, and conveyed by the purchaser to the appellant Rebecca. It is also alleged that the widow, Penina Jones, had, under some misapprehension, conveyed her interest in said real estate, being one-third thereof, to the appellees, but that such conveyance had been set aside as fraudulent, etc.; that the same, having been recorded, constitutes a cloud upon the title of the appellant Rebecca. The prayer is that her title be quieted, etc.

The appellees were properly served with process and defaulted. It was shown that the appellees were minors, and Thomas B. Orr was appointed guardian *ad litem* for them by the court.

The guardian answered the complaint in two paragraphs, and also filed a cross complaint, alleging that the said James Jones died seized in fee of said real estate in 1860, leaving surviving him several children and the said Penina Jones, as his widow, who, as such, was the owner of one undivided third part of said real estate, which she subsequently conveyed to them; that they are each the owner of one-sixth of said

land, and asking that partition of the same be made and their interests set off to them in severalty.

The appellants replied to the answer of the appellees by a general denial. They also answered the cross complaint in three paragraphs, to which the appellees replied by denial.

The cause was submitted to the court for trial at its June term, 1882. The court found, in substance, that the appellant Rebecca Jones was the owner of the undivided two-thirds of said real estate; that her co-appellant and husband, Silas J. Jones, had no interest in said real estate, and that the appellees were the owners of one undivided third part of said real estate. The court further found that the appellant Rebecca, and the appellees held said real estate as tenants in common, and that partition of the same ought to be made. Judgments in favor of the appellant Rebecca for two-thirds, and in favor of the appellees for one-third, of said real estate, were entered; partition was ordered, and commissioners appointed.

At the October term, 1882, of said court, the commissioners filed their report, stating that said real estate was not divisible, and that partition of the same could not be made without injury to the owners.

The court approved the report of the commissioners, ordered the real estate to be sold, and appointed Elijah Williams a commissioner to sell the same.

The record states that the appellant Rebecca then moved the court for a new trial, on the grounds that the decision of the court was not sustained by sufficient evidence, was contrary to the evidence and contrary to law, and because the court erred in refusing to allow the appellant Silas J. Jones to testify as a witness for the appellant Rebecca. The motion was overruled.

On the 6th day of November, 1882, the record states that the appellants filed their bill of exceptions within the time given by the court. It is not stated when the time was given by the court, whether at the trial term or at a subsequent term.

The bill of exceptions sets out the report of the commissioners, that the real estate could not be divided, its approval by the court, the order for the sale of the land, and the appointment of a commissioner to sell, etc., and the motion for a new trial which does not appear elsewhere in the record.

It is also stated in the record that on the 26th day of July, 1882, the appellant filed what is called the first bill of exceptions, in which it is stated that the appellant Rebecca offered to prove certain facts by her co-appellant Silas J. Jones, but that he was not permitted to testify, on the ground that he, as her husband, was an incompetent witness for her.

A motion for a new trial is set out in this bill of exceptions, which motion does not elsewhere appear in the record, nor is it stated in the record that such a motion was ever filed, except that the bill of exceptions states that it was filed on the 21st day of June, 1882, being the —— judicial day of the June term, 1882, of the court.

The errors assigned are as follows:

1st. The court erred in overruling the motion for a new trial.

2d. The court erred in ordering the sale of said real estate.

The appellees insist that what is called the first bill of exceptions is not a part of the record. And in this we think they are right. The bill of exceptions was not filed in term, but in vacation, between the June and October terms, 1882, of the court. The trial was had at the June term of the court, 1882, and the record does not show that time was then given to file a bill of exceptions. The bill of exceptions contains this statement: "The plaintiff asked and the court granted sixty days to the plaintiff in which to make, prepare and have filed this bill of exceptions, and this bill of exceptions is made out, prepared and filed within the time so given by the court."

The bill of exceptions could be filed in vacation only upon the authority given by the court for the purpose when in session, and the authority thus given must appear by the record, not by the bill of exceptions. Without such authority the bill of exceptions is no part of the record, and nothing can

appear from it. The judge can not make up the record by a bill of exceptions filed in vacation. We think what is called the first bill of exceptions can not be regarded as a part of the record. *Nye* v. *Lewis*, 65 Ind. 326; *Schoonover* v. *Reed*, 65 Ind. 313; *Goodwin* v. *Smith*, 72 Ind. 113 (37 Am. R. 144); *Applegate* v. *White*, 79 Ind. 413; *City of Indianapolis* v. *Kollman*, 79 Ind. 504.

The trial of the cause was had at the June term, 1882, of the court, and the finding then made and the judgment fixing the rights of the parties then rendered. There was no motion for a new trial made at that term. At the following October term, after the commissioners had made their report, the record shows that the appellant Rebecca made a motion for a new trial, which was overruled, and she excepted.

The appellees contend that this motion came too late; that it was not filed by the agreement, express or implied, of the parties, and can not, therefore, be regarded as presenting any question to this court for decision.

Section 561, R. S. 1881, under which the trial in this case was had, is as follows: "The application for a new trial may be made at any time during the term at which the verdict or decision is rendered; and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then, on the first day of the next term of such court, whether general, special, or adjourned."

The word "decision," as used in the above section, means "finding." *Christy* v. *Smith*, 80 Ind. 573. The above section applies to partition suits as well as to others. R. S. 1881, section 1188.

As the motion for a new trial was not made at the term at which the decision or finding of the court was made, it follows that no question as to a new trial is in the record. A bill of exceptions containing the evidence, filed within the time granted by the court at its October term, 1882, is in the record, but, as there was no proper motion made for a new trial, it is altogether unavailing.

The commissioners appointed to make partition having reported that the land could not be divided without damage to the owners, there was no error in ordering the sale of the same. R. S. 1881, section 1199.

We think there is no available error in this record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

Filed June 1, 1883. Petition for a rehearing overruled Oct. 19, 1883.

No. 9764.

## MULLANEY ET AL. *v.* INDIANA NATIONAL BANK OF INDIANAPOLIS ET AL.

PRACTICE.—*Bill of Exceptions.*—Under the code of 1852, where a motion for a new trial was overruled at a term subsequent to that of the trial, and time was then given for a bill of exceptions, questions as to the admissibility of evidence made at the trial could not be saved by the bill.

SAME.—*Evidence.*—As to what evidence will be sufficient to support a verdict in the Supreme Court, see opinion.

From the Superior Court of Marion County.

*T. A. Hendricks*, *A. W. Hendricks*, *C. Baker*, *O. B. Hord*, *L. L. Norton*, *J. R. Parmelee* and *A. Holladay*, for appellants.

*T. S. Rollins* and *G. W. Stubbs*, for appellees.

FRANKLIN, C.—Appellee sued appellants with Thomas F. Ryan, Charles H. Talbott, Ellen Catherwood, Adm'x, Dennis Mullaney, Patrick J. Mullaney and Thomas Hays, on two promissory notes. Plaintiff dismissed the case as to Ellen Catherwood, Adm'x, and Dennis Mullaney. Upon issues formed there was a trial by the court as to the other defendants. There was a finding for the plaintiff against appellants Patrick J. Mullaney and Thomas Hays, and for the defendants Thomas F. Ryan and Charles H. Talbott, on account of their discharge in bankruptcy. Appellants moved for a new

trial, which was overruled, and judgment rendered upon the finding.

Appellants appealed to the general term of the superior court, and assigned therein the following errors:

1st. The court in special term erred in overruling appellants' motion for a new trial.

2d. The complaint does not state facts sufficient to constitute a cause of action.

The court in general term affirmed the judgment at special term.

Appellants in this court have assigned the following error: "The court in general term erred in affirming the judgment of the court in special term."

No question appears to have been presented and discussed in the general term of the superior court, nor is there any presented or discussed in this court, as to the sufficiency of the complaint to constitute a good cause of action. Hence the second specification of errors filed in the general term of the superior court must be considered as waived. The overruling of the motion for a new trial is the only question to be considered.

The trial of the cause was had at the May term, 1880. Appellants then filed their motion for a new trial, which was held under advisement until the June term, 1880, when the same was overruled by the court, and time then given in which to file a bill of exceptions, which bill was filed within the time allowed.

The motion for a new trial contains eleven reasons, all of which, except the first three, are in relation to the admission, rejection and striking out of evidence. No bills of exceptions were filed at the term of the trial, embracing such rulings, and no time was given at such term to file bills of exceptions afterwards. This court has recently repeatedly held that where a motion for a new trial has been overruled at a subsequent term from that of the trial, a bill of exceptions filed within the time then given does not bring forward the exceptions to the rulings upon the admission, rejection or strik-

ing out of evidence; that it only brings forward in the record evidence given upon the trial. It is otherwise, however, under the Revised Statutes of 1881, section 626. But as the law stood at the times of trial, and the overruling of the motion for a new trial in this cause, no question is properly presented to this court upon these reasons for a new trial, and the counsel for appellants in their brief have not insisted upon them.

This leaves the first three reasons to be considered, and they are as follows: There was not sufficient evidence to support the finding of the court; the finding was contrary to the evidence and contrary to law. These reasons may all be considered together as one.

The notes sued on purported to be endorsed by appellants in their firm name, Mullaney & Hays. The defence pleaded by them was *non est factum*. Upon a trial on that issue the question presented is as to the sufficiency of the evidence.

It is conceded that the notes were not endorsed by either member of the firm of Mullaney & Hays, or with their knowledge. Their firm name was so used by one Dennis Mullaney, at the request of Ryan, the maker.

The appellants' counsel, in their able brief, earnestly argue that the proof fails to establish the *agency* of Dennis for any purpose, and that the endorsements were forgeries, and incapable of ratification. But, if subject to a ratification, the proof fails to establish that fact.

It is to be borne in mind that, in considering the points made by the appellants' counsel, it is not with the weight of the evidence, or the credibility of the several witnesses that we have to do, but with the enquiry, was there evidence before the trial court tending to prove either an original agency, or a ratification of an assumed one; and if there is evidence tending to prove either of said facts, the judgment must stand.

Upon an examination of the evidence as contained in the bill of exceptions, we give the following condensed synopsis thereof (which, we think, is substantially correct), from the

opinion of the court in general term: That the appellants Mullaney & Hays, Ryan, the maker of the notes, and said Dennis Mullaney, had long been intimate business associates, and for a time partners; that Mullaney & Hays were under personal obligations to Ryan; that the latter was uncle of the two Mullaneys, who were brothers; that all resided in the same city, and the two Mullaneys in the same house; that said Dennis had been a partner in the firm of Mullaney, Hays & Co., which had preceded the one involved here; that after withdrawing he made the old place of business his general place of resort, and that he was employed there by the firm at the time the notes were endorsed, although on indefinite terms; that he was accustomed to collect outside the place of business from the firm's customers, and, on reporting the collections, have himself charged on the books, with the assent of the partners, with a part of the sum so received and not paid over; that he used its name in other ways, such as receipting for express matter; that during all this time he held an uncertain and unsettled claim against the firm, growing out of the old partnership transactions, and that both the members of the firm knew of his custom to so use the firm name and render services of divers kinds to them, and acquiesced in and approved thereof. While this state of affairs existed, and said Dennis was at the firm's place of business, and during the absence of both partners from the city, Ryan, the maker of the notes, drove up in a buggy and called Dennis out and told him to endorse the notes in the firm name; that he at once complied, being informed and believing that it was all right, as Ryan told him. The notes were used by Ryan in his own indebtedness to the plaintiff, or were discounted by it. Both Mullaney and Hays, on returning to the city, were informed of the endorsements, and talked of it with Ryan and Dennis. They took no positive steps to disaffirm the endorsements, nor did they, by speech, disaffirm said endorsements until about the time the notes matured, or for several months after the endorsements were

made known to them. When Dennis informed Hays of the endorsements, Hays remarked that Dennis had done wrong, but Ryan might straighten the matter; that within ninety days after the endorsement of the notes all these parties, the two partners, Ryan and Dennis, were engaged in and consummated a settlement of the old partnership affairs, and the said new firm made its note for $1,000 to Dennis for a balance which was owing either to him or Ryan, and which settlement was with the concurrence of both members of the firm. There was evidence clearly tending to prove all the foregoing facts, and if they do not establish an agency in the beginning, they clearly tend to prove a subsequent ratification by the appellants.

We do not think that the evidence establishes a forgery in the endorsements, and that it is unnecessary in this case to examine and decide whether a forgery is susceptible of ratification.

The trial court had all the witnesses before it, except Ryan, whose deposition was read, and from their appearance and manner of testifying, could better judge of the weight that should be given to their evidence. Hence the well established rule, that if there is any evidence tending to support the finding of the court, this court will not disturb it upon the weight of the evidence. And under this rule, we can not say, in this case, that the finding of the court is not sustained by the evidence, nor that it is contrary to the evidence, nor that it is contrary to law.

There was no error in overruling the motion for a new trial, and no error in the superior court in general term affirming the judgment of the court in special term.

The judgment of the court in general term ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the superior court in general term be and it is in all things affirmed, with costs.

Filed March 16, 1883. Petition for a rehearing overruled October 17, 1883.

No. 9627.

## BENHAM *v.* STATE, EX REL. RICHARDSON.

BASTARDY.—*Evidence.—Paternity of Child.*—The defendant in a bastardy proceeding may ask the relatrix whether she has had sexual connection with others about the time the child was begotten, and when the relatrix testifies that she had connection with him at several different times within four or five days of each other, about a certain time, and a fully developed child is born in less than nine months thereafter, the court should not limit the time within which such enquiry may be made to two weeks preceding the time she thinks the child was begotten.

From the Ripley Circuit Court.

*S. M. Jones, J. L. Benham* and *A. Stockinger*, for appellant.

BEST, C.—This was a prosecution for bastardy. Judgment for the State. A motion for a new trial was overruled, and this ruling is assigned as error. This motion embraced many reasons, none of which need be noticed, except the ruling of the court in refusing to allow the defendant to ask the relatrix, upon cross-examination, whether she had had sexual intercourse with other persons between certain dates near the time when the child was begotten. The child was born on the 22d day of February, 1881, and the testimony strongly tended to show that it was a well developed and fully matured child at the time of its birth. The full period of gestation is nine months, and if the child went the full period it must have been begotten as early as the 22d of May, 1880. The relatrix went to live at the defendant's house as a domestic on the 9th of May, 1880, and she testified that he had sexual intercourse with her three or four times, four or five days apart; that the first time was about two weeks after she went there, and that she was not able to fix the time when the child was begotten, though she said that she had stated before the justice that it was begotten on the 1st of June or a week before; that the last time she menstruated was the last week in May, and that the first act of sexual intercourse did not occur before that time. She was unable to fix more def-

initely these several acts of sexual intercourse. Thereupon the defendant propounded to her, upon cross-examination, the following question: "Did you have sexual intercourse with anybody other than the defendant between the 9th day of May and the 9th day of June, 1880?" This question the court, upon objection, refused to allow her to answer, and also refused to allow her to answer a similar question covering the period from the 13th of May to the 17th of June, 1880, but limited the enquiry to the period between the 15th of May and the 15th of June, 1880. Of these rulings the appellant complains, and, we think, justly.

It has been settled by repeated decisions of this court that the relatrix may be required to state whether she has had sexual intercourse with any person other than the defendant about the time the child was begotten. *Walker* v. *State*, 6 Blackf. 1; *Hill* v. *State*, 4 Ind. 112; *O'Brian* v. *State*, 14 Ind. 469.

The limit within which this enquiry may be made is not, however, settled. This must necessarily depend upon the circumstances of each particular case. If conception is claimed to occur from a single act of coition, the date of which is fixed, there is but little difficulty in determining the period within which this enquiry may be made, but if it follows three or four different acts of sexual intercourse, occurring at different times, and a fully developed child is born less than nine months thereafter, the enquiry ought to embrace a greater period of time, especially before the alleged acts of intercourse. From the rulings in this case it appears that the court assumed that the child was begotten on the 1st of June, 1880, and then limited the enquiry to fifteen days before and fifteen days after this period. This was wrong. The court was not justified in assuming that the child was begotten on the 1st of June (if such assumption was made), nor in limiting the enquiry to fifteen days before and fifteen days after that time. In view of the facts that the child was fully developed, and was born on the 22d day of February, 1881, about nine months after the cessation of the *catamenia*, we think the ques-

tions propounded to the relatrix were proper, and that the court should have permitted her to answer them.

In *O'Brian* v. *State, supra,* where it was held that the court erred in not allowing such enquiry during two weeks before and after a single act of sexual intercourse, it was said that, "in the course of nature, a child, living and capable of surviving to the ordinary age of man, may be born in seven, and may not be till the expiration of ten months, or more, from the cessation of the *catamenia,* indicating the time of its conception;" and, if so, the enquiry ought not to be limited to a period of time less than two weeks before this event, especially where a fully developed child is born less than nine months thereafter. We think the trial court erred in these rulings, and because of them the judgment must be reversed.

The appellee has not attempted to justify these rulings, and we are unable to do so. The judgment, therefore, should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at the appellee's costs, with instructions to grant a new trial.

Filed November 3, 1883.

91 84
136 560

91 84
156 538

91 84
•163 658

91 84
166 246

No. 10,238.

## THE EXCELSIOR MUTUAL AID ASSOCIATION OF ANDERSON, INDIANA, *v.* RIDDLE.

LIFE INSURANCE.—*Civil Action.—Mandate.—Sufficiency of Complaint.—Demand.*—In a suit upon a contract of life insurance, wherein the insurance association agrees to pay the beneficiary therein named a certain sum of money, upon the happening of certain contingencies, a complaint in an ordinary civil action affords an adequate and specific legal remedy, and, in such case, the beneficiary can not resort to a proceeding by mandate. Where the contract stipulates that proofs of death shall be furnished to the secretary of the association, the complaint is sufficient if it show that such proofs were furnished to the association, and it is not necessary to aver therein a demand before suit brought.

The Excelsior Mutual Aid Association of Anderson, Indiana, *v.* Riddle.

SAME.—*Defence.—Fraudulent Concealment of Truth.—Reply.—Waiver of Forfeiture.*—Where, in such suit, the defence is that the party, whose life was insured, had falsely answered certain questions, and had fraudulently concealed the truth in answering other questions, in relation to his health and previous sickness, in his application for the policy of insurance sued upon, although the matters thus pleaded were such as avoided the contract of insurance, by its terms, yet, in legal effect, they merely rendered the contract voidable, at the election of the insurance company, and it was competent for the company to waive the forfeiture and continue the policy in full force. A reply of such waiver of forfeiture, alleging knowledge of all the facts stated in the answer, is a good reply to such a defence.

SAME.—*Physician and Patient.—Confidential Relation.—Competency of Evidence. —Witness.*—Under section 497, R. S. 1881, the relation between the physician and his patient is confidential, and the physician can not be permitted to give in evidence, in a court of justice any information acquired by him in the discharge of his professional duties, to the prejudice or injury of his patient or of his representative.

From the Madison Circuit Court.

*J. W. Sansberry, M. A. Chipman* and *J. W. Sansberry, Jr.*, for appellant.

*R. Lake* and *W. R. Pierse*, for appellee.

HOWK, J.—This suit was brought by the appellee against the appellant upon a written contract, executed on the 17th day of June, 1880, to one Aaron F. Riddle, whereby the appellant, for certain considerations expressed therein, assured the life of the said Aaron F., in the sum of $2,500, for the term of seventeen years, for the use and benefit of his daughter, the appellee. It was stipulated in such contract that, if Aaron F. Riddle should die before the expiration of the term aforesaid, the sum insured was to be paid within ninety days after legal proof of death was made to the secretary of the appellant at its home office. In her complaint the appellee alleged, among other things, that on the 15th day of February, 1881, the said Aaron F. Riddle departed this life, and, on the same day, written proof of his death was furnished to the appellant, and that she had duly performed all the conditions of the contract on her part to be performed; that

Aaron F. Riddle, during his lifetime, duly performed all the conditions of the contract on his part; that the appellant had not paid the said sum of $2,500, nor any part thereof, but the same remained unpaid. Wherefore, etc.

The cause was put at issue and tried by the court, and resulted in a finding and judgment in favor of appellee and against appellant, for the sum of $2,500 and costs of suit.

In their brief of this cause the appellant's counsel first insist that the trial court erred in overruling the demurrer to the appellee's complaint for the alleged insufficiency of the facts therein to constitute a cause of action. Counsel claim that the appellee was not entitled to the remedy pursued by her in this action, and that her proper remedy was by mandate to compel the appellant's officers to make an assessment upon its members, and not a direct action upon the written contract. No authority is cited by counsel in support of their position, and it seems to us untenable. It has always been the rule in this State that where a party has another specific legal remedy he can not resort to a proceeding by mandate. *Board, etc.*, v. *Hicks*, 2 Ind. 527; *Louisville, etc., R. R. Co.* v. *State, ex rel.*, 25 Ind. 177; *State, ex rel.*, v. *Board, etc.*, 45 Ind. 501. It is clear, we think, that upon the contract in suit the appellee had an adequate legal remedy in the ordinary civil action.

Appellant's counsel further say that the complaint was bad on the demurrer thereto, because it did not show that legal proof of the death of Aaron F. Riddle had been furnished to the secretary of the appellant. The complaint showed, however, that such proof was furnished to the appellant, and this, we think, was sufficient.

The last objection to the complaint, suggested by counsel, is that there was no demand shown therein. Where the suit is upon a written contract, for money shown to be due thereon, it is not necessary that the complaint should aver a demand therefor before suit brought. *School Town of Princeton* v. *Gebhart*, 61 Ind. 187.

The demurrer to the complaint was correctly overruled.

Appellant's counsel next discuss the alleged errors of the trial court in overruling its demurrers to the second, third and fourth paragraphs of appellee's reply to the second paragraph of appellant's answer. In this paragraph of its answer the appellant stated, in substance, that Aaron F. Riddle, in his application for the contract of insurance in suit, had falsely answered certain questions in the application, and had fraudulently concealed the truth in answering other questions, to the effect that he was then in good health; that he had not been sick for years, nor been attended by a physician; that he had no usual medical attendant; that he had never had any serious illness, local disease or personal injury; all of which answers were alleged to have been false.

In each of the second, third and fourth paragraphs of her reply the appellee alleged, in substance, that the appellant, with knowledge of the facts stated in the second paragraph of its answer, made assessments against Aaron F. Riddle and the appellee, under the contract of insurance, and collected and received such assessments.

We are of opinion that the court committed no error in overruling appellant's demurrers to these paragraphs of reply; for, although the matters alleged by appellant in the second paragraph of its answer were such as avoided the contract of insurance by its terms, yet, in effect, they simply rendered such contract voidable at the election of the appellant; and, notwithstanding the existence of those matters, it was competent for the appellant to waive the forfeiture thereby authorized, and continue the contract of insurance in full force. The facts alleged in these paragraphs of reply, if true, and the demurrers admitted their truth, showed that the appellant had waived the forfeiture and had continued the contract of insurance in force, and, therefore, each of these paragraphs was a good reply to the second paragraph of the answer. *Masonic Mutual Benefit Ass'n* v. *Beck*, 77 Ind. 203 (40 Am. R. 295), and authorities cited.

In its motion for a new trial the appellant assigned eight

different causes therefor, of which the first six related to the rulings of the court in the suppression of certain depositions and parts of depositions. Of these, the second and third causes, in relation to the suppression of the deposition of Dr. John W. Rutledge, are the causes chiefly complained of in argument by appellant's counsel. The testimony of Dr. Rutledge showed that he was the attending physician of Aaron F. Riddle, and was taken down, over the appellee's objection thereto at the time, upon the ground that it was privileged. The court suppressed the deposition on the same ground. In section 497, R. S. 1881, declaring what persons shall not be competent witnesses, the *fourth* class of such persons is as follows: "Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases." There is no substantial difference between this statutory provision and the former law on the same subject, so far as the question under consideration is concerned. The law as it existed prior to the taking effect of section 497, *supra*, was considered by this court in *Masonic Mutual Benefit Ass'n* v. *Beck*, *supra;* and it was there held that the relation between the physician and his patient is confidential, and that the physician can not be permitted to divulge, in a court of justice, information acquired by him in the discharge of his professional duty, to the prejudice or injury of his patient or his representative. Upon this point the case cited is well sustained by authority. The court did not err, we think, in suppressing the entire deposition of Dr. Rutledge in this case.

We have examined the other rulings of the court, suppressing parts of certain depositions, assigned as causes for a new trial, and have reached the conclusion that there is no available error in either of those rulings. In every instance the matter suppressed by the court seems to us to have been either immaterial or incompetent.

We can not disturb the finding of the trial court on the

evidence. There is evidence in the record which tends to sustain the finding on every material point, and in such a case this court will not reverse a judgment on what might seem to be the weight of the evidence.

We find no available error in the record of this cause.

The judgment is affirmed, with costs.

Filed May 11, 1883. Petition for a rehearing overruled October 11, 1883.

---

No. 9145.

## RINEHART *v.* RINEHART.

DEED.—*Covenants.—Encumbrance.—Agreement.—Delinquent Taxes.*—A. conveyed lands to B. by deed with covenants, upon which there were delinquent taxes, which B. afterwards paid. To a suit for breach of the covenants A. answered: 1. A written contract, contemporaneous with the deed, whereby it was agreed that the covenants of the deed should only be deemed to warrant the title against all conveyances and incumbrances made by A., and all acts done or suffered by him; 2. That A. had abundant other property out of which the treasurer could have made the taxes. *Held*, that both defences were bad on demurrer.

From the Clinton Circuit Court.

*J. C. Suit*, for appellant.

*S. H. Doyal* and *P. W. Gard*, for appellee.

FRANKLIN, C.—Appellee sued appellant to recover delinquent taxes paid by appellee upon lands conveyed by appellant to appellee by warranty deed.

Appellant answered in three paragraphs: 1st. A denial; 2d. That in connection with the execution of the deed, there was also executed a written agreement between the parties, which contained the following stipulation: "That the said covenant of warranty shall extend no farther and have no more effect than a covenant to warrant and defend said title against any and all conveyances, mortgages, or other encum-

brances made or executed by him, or acts done or suffered to be done by him, the said Allen Rinehart."

The third paragraph of answer alleged that the appellant had plenty of other property out of which the taxes could have been made by the treasurer of the county, and that the payment by appellee was voluntarily made.

A demurrer was sustained to the second and third paragraphs of answer.

There was a trial and a judgment for the appellee for the amount of the taxes so paid.

The error assigned is the sustaining of the demurrer to the second and third paragraphs of the answer.

We think that the suffering of the accumulation of delinquent taxes upon the land by the appellant while he owned it, and the permitting such unpaid taxes to remain after the execution of the deed, as an encumbrance upon the land conveyed, were breaches of the warranty in the deed; that the obligation on the part of appellant to pay the same was not released by the contemporaneous written agreement. Appellee had a right to remove the encumbrance and recover the amount thereof from the appellant.

The fact that appellant had sufficient property to pay the taxes did not amount to a payment and removal of the encumbrance. Appellee had a right to protect his title by paying the encumbrance, and in doing so he was not a volunteer.

There was no error in sustaining the demurrers to the second and third paragraphs of the answer.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment in the court below be and it is in all things affirmed, with costs.

Filed October 13, 1883.

No. 10,750.

| 91 | 91 |
|---|---|
| 146 | 632 |
| 91 | 91 |
| f166 | 329 |
| 91 | 91 |
| 170 | 507 |

## HARDY ET AL. *v.* BRIER.

FRAUD.—*Pleading.*—*Intention.*—The use of epithets in a pleading is not sufficient to show fraud, but the facts constituting the fraud must be distinctly averred. An intention to deceive must appear, and that in reliance upon the facts, with use of ordinary care, they were acted upon in good faith and the deception accomplished, to the prejudice of the other party.

PROMISSORY NOTE.—*Cancellation.*—*Forged Instrument.*—*Equity Jurisdiction.*—*Fraud.*—*Want of Consideration.*—*Negligence.*—A court of equity has jurisdiction to compel the cancellation of a forged instrument. So, also, of a promissory note procured by fraud; but not where the maker has been led to execute it by his own inexcusable negligence or folly, nor where it is merely without consideration.

SAME.—*Law Merchant.*—*Banks.*—A note payable at the bank at A. in this State, though there be only one bank there, it being a bank of discount and deposit, is not by our statute negotiable according to the law merchant.

From the Fountain Circuit Court.

*L. Nebeker* and *H. H. Dochterman*, for appellants.

*M. Milford* and *J. E. Schoonover*, for appellee.

HAMMOND, J.—Complaint in two paragraphs by the appellee against the appellants, to procure the cancellation of a promissory note, purporting to have been executed by the appellee to Patrick Hews, and assigned by endorsement to the appellants.

The note, copied in each paragraph of the complaint, is as follows:

"$130. FOUNTAIN COUNTY, IND., Jan. 21st, 1883.

"Eight months after date I promise to pay to the order of Patrick Hews, one hundred and thirty dollars, negotiable and payable at the bank at Attica, Indiana; value received, with use and attorney's fees, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment and notice of protest and non-payment of this note.

(Signed) "SAMUEL BRIER."

Endorsed: "PATRICK HEWS."

The first paragraph of the complaint charges that the note was forged by Hews, or some other person who is unknown to the appellee. The second alleges that Hews procured the execution of the note by the appellee by fraud. The appellants' demurrer, filed separately to each, was overruled as to both paragraphs. They then answered by the general denial to the first, and by a special plea to the second paragraph.

The special answer averred, substantially, that there was only one bank in Attica, Indiana; that it was a bank of discount and deposit; and that said bank was the one at which the note in suit was made payable. It further alleged that the appellants, without notice of any infirmity in the note, purchased it, paying its full value, before its maturity. The appellee's demurrer was sustained to this answer.

The appellants declining to answer further, there was a decree upon the second paragraph of the complaint, cancelling the note and declaring it null and void. The several rulings of the court on the pleadings above mentioned were excepted to by the appellants, and are assigned as errors in this court.

The first paragraph of the complaint is, in all substantial respects, the same as the complaints which were held sufficient in *Huston* v. *Roosa*, 43 Ind. 517, and *Huston* v. *Schindler*, 46 Ind. 38.

The appellants' counsel, in an able brief, insist that the law, as announced in those cases, should be reconsidered. It was held in those cases that one whose name has been forged to a negotiable instrument may maintain an action against an endorsee of such instrument to compel its surrender or a release therefrom. The right of the court in such case to grant relief was based upon its equitable jurisdiction. It is now urged that such jurisdiction does not exist, as the party may at law defeat such instrument when sued upon, and that such defence may be prepared for, whether suit be brought in his lifetime or thereafter against his personal representatives, under the statutory provisions for taking and perpetuating testimony. It is true that equitable jurisdiction is not as-

sumed by the courts where a plain, adequate and complete remedy exists at law, but in the absence of such legal remedy equitable relief may be invoked. 1 Story Eq., section 33. The right to cancel forged instruments has been fully recognized as belonging to the jurisdiction of the courts of chancery. 1 Story Eq., sections 700 and 701. This right we do not think is superseded or abridged by the statute for taking and preserving evidence for future use. The mere right of a defence at law, when it may suit the pleasure of the holder of a forged note to bring suit, can not be considered as an adequate remedy. The difficulty of anticipating and meeting in advance fabricated evidence that the forger of a note would not likely hesitate to resort to, in order to sustain its pretended validity, at once suggests the incompleteness and unsatisfactory character of an attempt to ultimately defeat such note by preserving evidence for that purpose under the statute.

Mr. Justice Story, in section 700, *supra*, says: "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose." And in *Hamilton* v. *Cummings*, 1 Johns. Ch. 517, where the jurisdiction of a court of equity in a case like this is clearly established, Chancellor KENT observes that "It is immoral for a person to retain a bond which is useless to him, and an annoyance to others." The enjoyment of a man's possession ought not to be poisoned nor his credit impaired by the probability, or even possibility, that at some future period the payment of a forged note may, under the forms of law, be enforced against his estate. Remedial justice is active rather than passive. It may be doubtful whether the remedy is adequate in any case which can not be used until the wrong-doer, or one claiming under him, sees proper to put the machinery of the law in motion to enforce his pretended right.

We think that the decisions in *Huston* v. *Roosa* and *Huston* v. *Schindler*, *supra*, rest upon solid principles of justice and equity, and are abundantly supported by authority. We ad-

here to the law as therein announced, and must, therefore, hold that the first paragraph of appellee's complaint is good, and that the demurrer thereto was properly overruled.

The second paragraph of the complaint, as already stated, sought the cancellation of the note on the ground that it was procured by the fraud of Hews. We think, on the authority of *Porter* v. *Holloway*, 43 Ind. 35; *Porter* v. *Daugherty*, 43 Ind. 37; *Holloway* v. *Porter*, 46 Ind. 62; *Crossan* v. *May*, 68 Ind. 242; *Rominger* v. *Keyes*, 73 Ind. 375; and *Butterfield* v. *Davenport*, 84 Ind. 590, that the note in controversy was not negotiable as an inland bill of exchange, and that the special paragraph of the appellants' answer, alleging facts not apparent on the face of the note, was insufficient. The note is to be regarded as not governed by the law merchant, and as subject to the same defences, and to the same proceedings for its cancellation, as if it were still held by the payee. Thus viewing it, are the averments of fraud in the second paragragh of the complaint sufficient to entitle the appellee to the relief asked? The allegations upon this point are as follows:

"That heretofore, to wit: On the 21st day of January, 1882, at said county of Fountain, one Patrick Hews, fraudulently intending to cheat and defraud the plaintiff, falsely represented that he, said Hews, was the agent for a large mercantile house, located in Chicago, Illinois, for which he was taking orders for merchandise, thereby inducing plaintiff to sign his name to what said Hews falsely represented to be a small order for goods, but which was, in truth and fact, a promissory note for the sum of $130, of which by the said signing the plaintiff became the maker." It is further alleged, "that at the time of signing said note, as aforesaid, he (the appellee) owed said Hews nothing whatever, and had never promised to give him such note, or any note, and had never talked to him on the subject of giving him a note, and that the execution of the said note was wholly without any consideration whatever."

A transaction is not to be regarded as fraudulent simply

because it is so designated. In pleading fraud the facts constituting the fraud must be specifically set forth. Epithet will not answer the place of fact. Representations and statements must not only be false, but must be material and made with reference to existing facts. The party making them must intend to deceive, and the person to whom they are made, using ordinary care to ascertain their truth, must reasonably believe them to be true, and, acting upon them in good faith, be thereby deceived to his prejudice. These principles are familiar, and, applying them to the case at bar, we are compelled to declare against the sufficiency of the second paragraph of appellee's complaint. The averments do not show that the representation made by Hews, that he "was the agent for a large mercantile house, located in Chicago," was material. There is no charge that the appellee did not know its falsity as well as Hews. It is not shown how such representations, if he believed it, had the effect to cause him to sign the note. It does not appear that any cunning contrivance, or dexterous or ingenious procedure was resorted to, to induce the appellee to sign the note on the supposition that he was merely signing "a small order for goods." We may possibly infer that Hews told him it was a small order for goods, but no fact is given which could have authorized the appellee to believe a statement so manifestly untrue. It is not stated that he could not see, or that he could not read, nor that the instrument was incorrectly read to him under circumstances which gave him the right to rely upon it as read. Equity can not relieve parties from consequences into which they have been led by their own inexcusable negligence or folly. To entitle one to have an instrument surrendered on the ground of fraud in its procurement, the fraud must be definitely alleged and clearly proved as alleged. Story Eq., section 694 a. The averment that the note was given without any consideration whatever does not make the complaint good. Of course, this would be a sufficient defence in an action upon the note for its collection. But to authorize equit-

able relief, by the cancellation of a written instrument, some element of fraud, excusable accident, or mistake, must have entered into the transaction, whereby its execution was induced. A man may not, in the absence of fraud or mistake, voluntarily execute a promissory note without consideration, and then ask a court of equity to cancel the note.

The court erred in overruling appellants' demurrer to the second paragraph of the complaint.

Reversed and remanded, with instructions to the court below to sustain the demurrer to the second paragraph of the complaint, and for further proceedings consistent with this opinion.

Filed November 1, 1883.

---

No. 10,991.

91 96
125 344
125 385
127 171

91 96
128 49

91 96
130 108

91 96
131 402
132 62
132 133
132 305
133 156
133 344

91 96
134 121
136 373

91 96
137 214
138 226

91 96
145 201
147 690

91 96
150 301
150 431

91 96
f169 641

## Mescall v. Tully et al.

Trusts.—*Parol Agreement.—Statute of Frauds.—Conveyance.*—A parol agreement between grantor and grantee, in consideration of their expected marriage, that lands conveyed by absolute deed shall be held in trust for both parties, is void by the statute of frauds.

Mortgage.—*Foreclosure.—Sale.*—Where one has conveyed all his title to mortgaged real estate, in consideration that the grantee would pay the mortgage, and there has been a sale upon foreclosure satisfying the judgment, the grantor can not contest the validity of the decree ordering the sale.

Pleading.—*Complaint.—Construction.*—A complaint must proceed upon some definite theory, and must be construed with reference to that theory.

From the Superior Court of Marion County.

*W. Patterson*, for appellant.

*R. O. Hawkins* and *P. Norton*, for appellees.

Elliott, J.—The first paragraph of the complaint alleges that appellant was the owner of certain real estate in fee; that he executed jointly with his then wife, Mary Ann Mescall, a mortgage to Richard E. Stanton; that Mary Ann died, and the appellant afterwards entered into a marriage contract with

Julia Tully; that there was then an oral agreement made wherein appellant agreed to convey to Julia the real estate upon the condition that she would assume and pay the mortgage executed to Stanton, and that she would hold the property equally in trust for herself and appellant; that appellant, pursuant to this agreement, conveyed the property to Julia, and on the day following they were married; that Mark Tully is the brother of Julia, and has colluded with her to defraud the appellant, and, pursuant to their fraudulent scheme, falsely represented that the Stanton mortgage was satisfied by Julia; that Mark did pay this mortgage, but wrongfully took an assignment thereof; that afterwards Julia abandoned the appellant, and he obtained a decree of divorce; that Mark Tully filed his complaint praying for a foreclosure of the mortgage; that such proceedings were had as resulted in a decree of foreclosure; that sale was made on the decree, and the property purchased by the appellee Mark Tully. It is also alleged, as an excuse for suffering judgment in the foreclosure suit to go by default, that the appellant was unable to read or write, "and was sick and disordered in his mind." The second paragraph is substantially the same as the first, except that it sets forth the proceedings in the foreclosure suit in full, and the third is in substance the same as the first and second, except that it does not refer to the foreclosure proceedings.

In our opinion one principle determines the validity of all these paragraphs, and that is this: An express trust can not be created by parol. As the appellant conveyed the land to Julia Tully by a deed absolute on its face, he can not destroy the effect of his conveyance by alleging that there was a verbal agreement that she should hold it in trust for both of them. Our cases are full upon this subject, and they are in line with the doctrine of the text-writers. *Dunn* v. *Dunn*, 82 Ind. 42; *Owens* v. *Lewis*, 46 Ind. 488 (15 Am. R. 295); *Pearson* v. *East*, 36 Ind. 27; *Irwin* v. *Ivers*, 7 Ind. 308; 1 Perry Trusts, section 79; 1 Greenl. Cr. 356, *n.*; 1 Hilliard Real Prop. 425.

The case is not one where the doctrine upon which constructive trusts are founded can have force, for here the only trust is the express one alleged to have been created by parol. Where there is an express trust there can be no implied one. There are no facts upon which the law can frame a construction of a resulting trust. It would be a plain violation of the letter and the spirit of the statute to permit a deed absolute in its terms to be turned into the conveyance of a trust by a verbal agreement. The very evil the statute was intended to prevent is the one which would prevail if an express trust could be created against an absolute conveyance by an oral agreement. The whole purpose of the statute would be defeated if a deed absolute in terms were allowed to be transformed into an instrument creating a trust for the benefit of the grantor or any one else.

There was no contract of sale, and the cases of *Fisher* v. *Wilson*, 18 Ind. 133; *Wiley* v. *Bradley*, 60 Ind. 62; *Stephenson* v. *Arnold*, 89 Ind. 426; *Jarboe* v. *Severin*, 85 Ind. 496, have not the slightest application. It would be strange indeed if a party could be permitted, in the face of our broad and explicit statute, to use an oral agreement creating an express trust for the purpose of charging the grantee with the value of the property conveyed by the deed. It would endanger all titles to hold such a doctrine. It finds no support in the cases, and has none in principle.

The appellant having, by an absolute deed, divested himself of all title to the land, is not in a situation to question the validity of the decree ordering its sale. One who has conveyed all his title to mortgaged property can not contest the validity of a decree ordering its sale. Having no interest in the land he has no right to interfere.

There is no showing that appellant will be held to a personal liability on the judgment in the foreclosure suit, for the sale of the mortgaged premises discharged that debt, and, as he owns no interest in the land, the complaint shows no legal injury.

It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all. A complaint can not be made elastic so as to take form with the varying views of counsel. *Johnston* v. *Griest*, 85 Ind. 503; *Platter* v. *City of Seymour*, 86 Ind. 323; *Johnston, etc., Co.* v. *Bartley*, 81 Ind. 406; *Judy* v. *Gilbert*, 77 Ind. 96 (40 Am. R. 289); *Lockwood* v. *Quackenbush*, 83 N. Y. 607; *Salisbury* v. *Howe*, 87 N. Y. 128. The theory upon which the complaint is constructed is that the parol agreement transformed the deed from an absolute conveyance into an instrument creating a trust, and as this theory is overthrown by the authorities the entire complaint is foundationless. This theory is the foundation of the complaint, and, as that falls away, the whole pleading must go down.

Judgment affirmed.

Filed October 18, 1883.

---

No. 10,509.

## OVER ET AL. *v.* SHANNON ET AL.

91 99
146 597

SHERIFF'S SALE.—*Execution.*—*Exemption.*—Where an execution defendant claims real estate as exempt from execution in the manner required by statute, the sheriff can not make a valid sale thereof, by disregarding the claim of exemption and neglecting to have an appraisement of the property claimed as exempt, nor will the fact that perjury was committed in swearing to a false schedule give validity to such sale.

From the Hamilton Circuit Court.

*D. Moss*, *R. R. Stephenson* and *W. S. Christian*, for appellants.

*W. Neal* and *J. F. Neal*, for appellees.

BICKNELL, C. C.—This was an action by the appellants against the appellees to recover the possession of a town lot and damages for its unlawful detention.

The defendants answered by a general denial.

Upon a trial by the court, without a jury, there was a finding for the defendants.

The plaintiffs moved for a new trial, alleging that the finding was contrary to the evidence and was not sustained by the evidence.

This motion was overruled; judgment was rendered upon the finding, and the plaintiffs appealed, assigning for error the overruling of the motion for a new trial. The plaintiffs showed a *prima facie* title, under a sheriff's deed to them, as purchasers upon an execution issued on a judgment in their favor against the defendant Smith D. Shannon.

The defendants claimed that the property was exempt from execution and sale under the statutes of 1852 and 1861. 2 R. S. 1876, p. 352.

The objections made by the appellants in their brief, to the sufficiency of the defendants' evidence, are that no real estate was mentioned in the schedule, and that, in the affidavit accompanying the schedule, the defendant Smith D. Shannon swore falsely, as appears by the record. But the bill of exceptions shows that the real estate levied on was mentioned in the schedule; that exemption was claimed before the sale; that the schedule contained first a list of twenty-one items of personal property, and then the following statement: "I claim the remainder of the $300 allowed to me by law, in lot number 2, block 3, in John J. Harrison's second addition to Cicero town, Hamilton county, Indiana, and ask that that amount in said lot be set off to me." The description of the real estate in this claim is the same as the description in the complaint of the land sought to be recovered. The claim for exemption nominated George Kreag an appraiser on behalf of the defendant Shannon, and concluded as follows:

"The articles number 1 to 21, inclusive, are those I demand exempt, and I swear that the foregoing inventory contains a full and true account of all my real estate within or without this State, money on hand or on deposit within or without this State, rights, credits and choses in action, and

all personal property of any description whatever belonging to me, or had and held by me, or in which I had any interest at the date of issuing said execution, to wit, on the 6th day of July, 1876. (Signed) S. D. SHANNON.

"Sworn to before me this the 6th day of July, 1876.

"W. MAAL, Notary Public."

Following this affidavit is a sworn appraisement of the twenty-one items of personal property together, of the value of $96.65, as follows:

"We, George Kreag and Jacob Stack, the appraisers selected to appraise the property in the foregoing schedule, have been duly sworn, and, having examined said property, have appraised the several items at the sum set opposite thereto, and we swear that the same is a full fair cash value of the same, to the best of our judgment.

(Signed) "GEORGE KREAG,

"JACOB STACK.

"Sworn to before me this 6th day of July, 1876.

"WM. MAAL, Notary Public."

The bill of exceptions also shows that Smith D. Shannon was a resident householder of the county. It thus appears that exemption was claimed substantially in accordance with the statutes in force at the time, not only of the personal property, but also of the real estate levied upon.

It does not appear that the real estate was appraised, but, upon such a claim made, it was the duty of the sheriff to appraise the real estate as well as the personalty. 2 R. S. 1876, p. 355, section 11; *Douch* v. *Rahner*, 61 Ind. 64.

The sheriff's failure to appraise the real estate did not affect the validity of the claim for exemption. 2 R. S. 1876, p. 355, sec. 11; *Douch* v. *Rahner*, *supra*.

The bill of exceptions also shows that the claimant for exemption had other real estate besides that mentioned in the schedule, but it has been decided that although the claimant own such other property, and be liable for perjury upon such a false statement in the affidavit, he is not thereby precluded

from claiming and holding the property levied on as exempt from execution. *Douch* v. *Rahner, supra.*

The appellant refers to *Over* v. *Shannon*, 75 Ind. 352, as decisive of this case, but there the ruling was, that an answer relying upon a claim for exemption is insufficient, unless it shows the filing of such a schedule as the law requires, What we now decide is, that when a claim for exemption is substantially in accordance with the statute, and the schedule is sworn to as the statute requires, the sheriff can not refuse to appraise and set apart the property on the ground of perjury in the affidavit. *Douch* v. *Rahner, supra;* and see *Boesker* v. *Pickett*, 81 Ind. 554; *Kelley* v. *McFadden*, 80 Ind. 536. The case of *Jones* v. *Kokomo Building Association*, 77 Ind. 340, cited by the appellant, did not involve the questions made in this case. There was no error in overruling the motions for a new trial. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed October 11, 1883.

91 102
133 472

91 102
141 683
142 184

91 102
145 461

91 102
153 76

91 102
e168 584

No. 10,352.

## HAYS *v.* TIPPY ET AL.

CONSTITUTIONAL LAW.—*Construction of Statute.—Supreme Court.*—When the constitutionality of a statute is called in question, it is the uniform rule of the Supreme Court to construe and interpret its provisions, if possible, so as to sustain and not defeat the law; and even where the constitutionality of the law seems to be doubtful, the doubt will be solved in favor of its constitutionality.

DRAINAGE LAW.—*Special Proceeding.—Failure to Remonstrate.—Assessment.—Relief From.—Statute Construed.*—A proceeding under the drainage act of April 8th, 1881 (sections 4273 to 4284, R. S. 1881), for the construction of a ditch or drain, is not a civil action, and the provisions of section 396, R. S. 1881, of the civil code, are not applicable to such a proceeding.

From the Grant Circuit Court.

*G. W. Harvey*, for appellant.
*J. L. Custer*, for appellees.

HOWK, J.—The only question for decision in this case is this: Does the complaint of the appellant, the plaintiff below, state facts sufficient to constitute a cause of action to entitle him to any relief?

The complaint was in form an affidavit, and therein the appellant stated, upon his oath, that he was the owner and in the possession of certain real estate, particularly described, in Grant county; that on the 14th day of September, 1881, the appellees filed, in the court below, their petition, asking for the construction of a ditch to drain the lands therein mentioned; that the court granted the prayer of such petition, and the commissioners of drainage proceeded to view the premises, and, on September 27th, 1881, they made their report, in open court, in favor of the construction of the ditch or drain; that in such report the appellant's lands were reported as benefited in certain named sums, amounting in the aggregate to the sum of $128; that the court then ordered the drain to be constructed and the report confirmed; that at the time the report was made and continuously thereafter, until October 4th, 1881, the appellant was quite ill and confined to his house, and unable to look after or see to any business; that on September 27th, 1881, and for four days thereafter, his disease was of such an aggravated and distressing character as to unfit and prevent him from going to look after, remonstrating against the report, or giving directions concerning the same; that if he had not been so prevented by his sickness and disease, he would have remonstrated, within the three days allowed by law, against the report of the commissioners; that appellant's land would be, in no way, benefited by the construction of the drain, so reported by the commissioners, which he would be able to show by competent proof; that appellant's lands were assessed too much, as compared with other lands assessed as benefited, as shown by the re-

port; and that, being so prevented by sickness from remonstrating against the report within the three days allowed by law, appellant would be greatly injured by reason of such assessments, unless he should be allowed to have the report set aside as to him, and be permitted to remonstrate against such report. Wherefore, etc.

Appellees' demurrer, for the want of sufficient facts, was sustained to the foregoing complaint, and, appellant declining to amend, judgment was rendered against him for appellees' costs.

The assessments against the appellant's lands, from which he seeks to be relieved in this action or proceeding, were made under and pursuant to the provisions of "An act concerning drainage," approved April 8th, 1881, Acts 1881, p. 397; sections 4273 to 4284, R. S. 1881. It must be assumed, because the contrary is not shown or claimed, that all the proceedings in which the assessments complained of by appellant were made, were had in strict conformity with the requirements of the statute. In section 4275, R. S. 1881, the commissioners of drainage are required, among other things, to "assess the benefits or injury, as the case may be, to each separate tract of land to be affected" by the drainage. The appellant did not claim that his lands were not affected by the drainage, but he alleged that his lands would be, in no way, benefited by the construction of the drain, and were assessed too much, as compared with other lands assessed as benefited, as shown by the report of the commissioners of drainage.

In section 4276, R. S. 1881, it is provided that "Upon the making of such report to the court, three days shall be allowed to any owner of lands affected by the work proposed, to remonstrate against the report; and any such remonstrance shall be verified by affidavit, and may be for any or all" of eight different causes. The fourth of these causes is the only cause applicable to the appellant's case, as shown in his complaint, as follows:

"*Fourth.* By any person or persons whose lands are assessed for benefits, that his, her, or their specified lands are assessed too much as compared with other lands assessed as benefited."

The same section also contains the following provision: "If there be no remonstrance, * * * * the court shall also make an order declaring the proposed work established and approving the assessment, and shall direct some one of the commissioners to construct and make the proposed work."

The record shows that, on September 27th, 1881, the commissioners of drainage made their report to the court, "which report the court receives, and, after due examination, finds that the drainage proposed is practicable, and that the same, when completed, will improve the public health and be of public utility, and that the costs and expenses of construction will be less than the benefits derived from the drainage of the lands to the owners thereof, and the court now allows three days for the filing of any remonstrance by any of the property-holders affected by the aforesaid assessments of benefits. And day is given." After the lapse of three full days, to wit, on October 1st, 1881, the court made an order, as provided in the statute, declaring the proposed work established, and approving the assessment, and directing "one of the commissioners to construct and make the proposed work."

Appellant's verified complaint, in this proceeding, was not filed or presented to the court until the second day of its next succeeding term, to wit, on November 22d, 1881.

The first point made by appellant's counsel, in argument, is thus stated in his brief: "We think that portion of section 4 of the drainage act of 1881 (section 4276, R. S. 1881), providing that but three days shall be allowed by the court in which an owner of lands affected by the construction of the drain may remonstrate, is unconstitutional." The learned counsel has not referred us to any clause or section of the constitutions, State or Federal, to which it can be said that this provision of the statute is clearly repugnant, and we know of none. If the constitutionality of the provision is

merely doubtful we are bound, by all the decisions, to give it the benefit of the doubt, and hold it to be constitutional. *Warren* v. *Britton*, 84 Ind. 14. The time given for remonstrating is short, and the provision may, therefore, seem unreasonable and oppressive, but this will not authorize the courts to declare it unconstitutional. *Barton* v. *McWhinney*, 85 Ind. 481. The only remedy for such a defect in the statute is an appeal to the law-making power.

It is next insisted by the appellant's counsel that the last clause of section 396, R. S. 1881, is applicable to the case stated in his verified complaint. This clause reads as follows: "The court may, also, in its discretion, allow a party to file his pleadings after the time limited therefor; and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings, on complaint or motion filed within two years." This section is section 135 of "An act concerning proceedings in civil cases," approved April 7th, 1881. We are of the opinion that the provision of the civil code, above quoted, is wholly inapplicable to such a proceeding as the one under consideration in the case at bar. This proceeding is not, in any proper sense, a civil action or a civil case. It is a special proceeding, authorized by the General Assembly for the express purpose of promoting public health or improving public highways. Throughout the entire statute it is manifest that the Legislature did not intend that such a proceeding, for such public purposes, should be subjected to any of the delays ordinarily incident to the trial of a civil case. It is provided that "three days shall be allowed to any owner of lands affected by the work proposed, to remonstrate against the report;" and if, during such three days, the appellant was prevented by disease from presenting his remonstrance, that would seem to be his misfortune rather than the fault of the law. In any event, we think it is clear that the provisions of the civil code, above quoted, are not appli-

cable to the proceedings, of which the appellant complains, in the case in hand.

We find no error in the record.

The judgment is affirmed, with costs.

Filed Oct. 18, 1883.

No. 10,457.

## WARREN ET AL. *v.* ABLE ET AL., ADMINISTRATORS.

PROMISSORY NOTE.—*Execution.*—*Evidence.*—Proof that a note has frequently been presented to the maker, that he made one payment upon it, often promised to pay the balance and never questioned its genuineness, is, in the absence of countervailing evidence, sufficient proof of its execution.

DECEDENTS' ESTATES.—*Partnership.*—Partnership creditors can have distribution of the surplus only of the individual estate of a deceased partner after the payment of his individual debts.

From the Monroe Circuit Court.

*J. H. Louden*, *R. W. Miers* and *J. R. Fritts*, for appellants.

ZOLLARS, J.—On the 19th day of September, 1880, appellants filed a claim against appellees, as the administrators of the estate of John E. Farmer, deceased. The claim consists of a promissory note, dated April 6th, 1860, due six months after date, payable to L. L. Warren & Co., or order, and executed by "Farmer & Williams." A statement, in the nature of a complaint, accompanies the note, in which it is averred substantially that L. L. Warren & Co. was and is a firm, composed of appellants, and that John E. Farmer, appellees' decedent, and Vincent E. Williams, constituted the firm of Farmer & Williams, the makers of the note. The issue was closed by the filing of answers and a reply.

At the April term, 1882, the claim was referred to the master commissioner of the court for his report at the next term. At the September term, 1882, the commissioner filed his report "of the evidence and his finding thereon." The

report shows that the attorneys of the parties appeared before the commissioner during the time the evidence was being heard. The note above described, with an endorsement of a payment of $60, on the 23d day of January, 1869, was introduced in evidence. One Alexander was a witness. The substance of his testimony is as follows: Prior and subsequent to 1869, the witness had the note in his possession, called upon the decedent for payment, had frequent conversations with him about the note before and after the payment of the $60 by the decedent, which payment is endorsed upon the note. At different times the decedent promised to pay the balance due upon the note, and never, at any time, questioned the genuineness of the note. The firm of Farmer & Williams was composed of the decedent and Vincent E. Williams, and was in existence and doing business at the time the note was executed. Appellees offered no evidence in contradiction of this; indeed, no evidence at all. The other evidence establishes, without contradiction, that at the time the note was made, and at least for a year thereafter, the decedent and said Williams were engaged in business as partners, under the firm name of Farmer & Williams; that the firm was dissolved in 1861 or thereabouts, by Farmer buying out the interest of Williams in the partnership; that Farmer was solvent at the time of his death; that Williams, since 1875 or 1876, has been insolvent, and that there are no assets belonging to the firm of Farmer & Williams. The parties agree that the first effort to collect the note by suit is the present proceeding. Upon this evidence the commissioner reported that appellants ought to recover, at their costs, $177.65, etc., to be paid out of the assets of the estate of Farmer *in pari passu* with other creditors. Appellees filed exceptions to the report, which the court sustained, set aside the finding of the commissioner, found for appellees, and over a motion for a new trial rendered judgment in their favor for costs. Appellants excepted to the rulings upon the above named motions and filed their bill of exceptions. These rulings

are assigned as error. There was evidence tending to establish facts other than those above set out. We have noticed those only which are clearly established by the testimony. Upon the facts so established, appellants were entitled to a judgment, payable out of the assets of the estate of Farmer, deceased, after the payment of individual creditors, if any. This is settled by the adjudications of this court, some of which we cite, without further extending this opinion for comment. *Weyer* v. *Thornburgh*, 15 Ind. 124; *Dean* v. *Phillips*, 17 Ind. 406; *Hardy* v. *Overman*, 36 Ind. 549; *Olleman* v. *Reagan*, 28 Ind. 109; *Bond* v. *Nave*, 62 Ind. 505; *McCoy* v. *Payne*, 68 Ind. 327; *Bake* v. *Smiley*, 84 Ind. 212.

It results from what we have said that the judgment must be reversed. It is accordingly reversed, at the costs of appellees, with instructions to the court below to sustain the motion for a new trial.

Filed Oct. 18, 1883.

91 109
133 472

91 109
157 668

No. 10,507.

## Eaton *v.* McKahan et al.

Chattel Mortgage.—*Recording.*—A chattel mortgage does not take effect until it is accepted by the mortgagee, and if recorded within ten days from such acceptance, it is sufficient under the statute, R. S. 1881, section 4913.

From the Hamilton Circuit Court.

*D. Moss*, *R. R. Stephenson* and *W. S. Christian*, for appellant.

*R. Graham* and *J. F. George*, for appellees.

Bicknell, C. C.—The appellant, plaintiff below, sold a steam engine to the defendant Tyner, and took a mortgage thereon to secure the price. The mortgage was dated and acknowledged on the 25th of April, 1882, but was not recorded until the 15th of May, 1882. The property remained in the possession of the mortgagor.

In such a case a chattel mortgage is void as to third persons. R. S. 1881, section 4913.

The defendant McKahan had a judgment against Tyner on which he issued execution, and the defendant Bolton, a constable, had levied that execution on the engine and had advertised it for sale.

The defendant Seemans, as sheriff, also held an execution against Tyner, and was threatening to levy upon the engine. These executions were of later date than the mortgage.

The plaintiff filed his complaint against said defendant, stating the foregoing facts and alleging that, although "the mortgage was signed by said Tyner and placed in the plaintiff's hands on April 25th, 1882, yet the plaintiff, by reason of certain defects and omissions therein," did not accept it until May 6th, 1882; that he then accepted it, and afterwards, on May 15th, 1882, had it duly recorded.

A temporary restraining order was made forbidding any sale or offer for sale of the engine, otherwise than subject to the mortgage.

A demurrer to the complaint, for want of sufficient facts, was sustained; a motion by plaintiff to reinstate the restraining order was overruled; judgment was rendered for the defendants upon the demurrer, and the plaintiff appealed, assigning these rulings as errors.

Merely signing an instrument is not a delivery of it; there is no delivery without acceptance. *Evans* v. *White*, 53 Ind. 1.

The demurrer admitted the facts stated in the complaint. It therefore admitted that the mortgage was not accepted until May 6th, 1882, and that it was recorded on the 9th day thereafter. The mortgage was, therefore, valid as against the executions mentioned in the complaint, and the court erred in sustaining the demurrer to the complaint.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the

same is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to overrule the demurrer to the complaint, and to reinstate the restraining order.

Filed Oct. 17, 1883.

No. 10,436.

91 111
126 238

## The Indiana, Bloomington and Western Railway Company *v.* McBrcom.

Negligence.— *Pleading.*— *Railroads.* — *Injury by Fire from Locomotive.*— A complaint to recover for property destroyed by fire negligently kindled on the defendant's premises and communicated to the plaintiff's adjoining property, which fails to aver that the defendant negligently suffered the fire to communicate to plaintiff's property, is bad on demurrer.

From the Vermillion Circuit Court.

*C. W. Fairbanks*, for appellant.

*S. F. Wood*, for appellee.

Morris, C.—The appellee sued the appellant to recover damages for the destruction of certain property in Fountain county, Indiana, alleged to have been caused by the negligence of the appellant. The complaint consists of six paragraphs, the first of which is, in substance, as follows:

It is alleged that on the 7th day of August, 1880, the appellant was the owner of, and running and operating, a railroad, extending from the city of Indianapolis, Indiana, through the said county of Fountain, to Peoria, Illinois, and that the appellee was then the owner of certain real estate in the county of Fountain, adjoining the appellant's road and right of way; that from the long and continued drought, grass, vegetation and rubbish became very dry, and that on said day, and while said appellant was operating said road and running its locomotives on said road, and on that part of it adjoining the appellee's land, coals and sparks of fire were negligently

dropped from its locomotives, which set fire to an accumulation of dry grass, weeds, rubbish and other combustibles, carelessly and negligently suffered and permitted to gather on the line of said road and upon the appellant's right of way, and over which the appellant had the management and control; and that said fire, through the medium of said dry grass, weeds, rubbish and other combustible material, carelessly and negligently suffered and permitted to gather and accumulate as aforesaid, was communicated to the fence of the appellee which divided his fields from the appellant's right of way, and burnt and otherwise destroyed eighty rods of the appellee's fence, to his damage $100.

The other paragraphs of the complaint are like the above, except that in the fifth and sixth it is alleged that the damage to the appellee's property was caused without fault or negligence on his part.

The appellant demurred to the complaint, for want of facts. The court overruled the demurrer. The cause was put at issue and the venue changed to the Vermillion Circuit Court.

The cause was submitted to a jury, who returned a verdict for the appellee, upon which, over a motion for a new trial, judgment was rendered.

The ruling of the court upon the demurrer to the complaint is assigned as error, and the question thus raised is the only one discussed by the appellant.

The objection urged to the complaint is that it is not averred in either paragraph that the appellant negligently suffered the fire, negligently started on its right of way, to escape therefrom and communicate to the property of the appellee. It is not averred in any paragraph of the complaint, that the appellant negligently allowed the fire to communicate to the property of the appellee. The appellee contends that in this case such an averment is not necessary; that, upon proof of the facts alleged in his complaint, he would be entitled to recover. This may be true, but the question is one of pleading,

not of evidence. In the case of *Pittsburgh, etc., R. W. Co.* v. *Culver*, 60 Ind. 469, NIBLACK, C. J., says:

"Negligence in starting the fire may be such in many cases as will tend to establish negligence in allowing it to communicate to the property of others, and to thus characterize the whole transaction as a negligent one; yet an averment that the fire was negligently started will not dispense with, or supply the place of, an allegation that the fire was negligently allowed to communicate to the property of other persons, as above stated."

In the case of *Pittsburgh, etc., R. W. Co.* v. *Hixon*, 79 Ind. 111, a complaint like that now before us was held bad because it was not averred that the fire was negligently allowed to communicate to the plaintiff's property, though it was averred in that case, as in this, that the company negligently set fire to dry grass, etc., negligently allowed to accumulate on its right of way, and that through the medium of such dry grass, etc., the fire was communicated to the plaintiff's property. These cases have been approved by several subsequent cases, and must now be regarded as the law of this State.

In the case of *Louisville, etc., R. W. Co.* v. *Ehlert*, 87 Ind. 339, the complaint is, in substance, the same as in the case before us. It was held bad for the want of an averment that the defendant negligently permitted the fire to escape from its right of way and communicate to the property of the plaintiff.

We think the demurrer to the complaint should have been sustained.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee.

Filed Oct. 19, 1883.

No. 10,732.

## WHIPPLE *v.* SHEWALTER.

91 114
127 534
91 114
147 232
91 114
158 200

LANDLORD AND TENANT.—*Complaint to Recover.—Possession.—Rent.—Lease.—Exhibits.—Demurrer.*—A complaint by a landlord against his tenant who fails to pay rent, to recover possession and damages for unlawful detention, is not founded on the lease, and the lease, if made an exhibit, will not be examined on a demurrer to the complaint.

SAME.—*Description of Premises.—Evidence.*—A tenant can not escape payment of rent, according to the terms of the lease, for the time he occupied thereunder, upon the ground that the premises are not described in the lease as to their location; and such lease is admissible in evidence, in an action for rent accrued, to show the contract as to rent, and in an action for possession, to show the amount of damages for detention after notice to quit; and evidence of the location of the premises corresponding to the description in the complaint is proper in such action.

SAME.—*Notice to Quit.*—A notice to quit, from a landlord to a tenant, is sufficient if it apprise the latter as to what premises are demanded.

SAME.—*Damages.—Instruction.*—When, in an action by a landlord against his tenant, unlawfully holding over after the termination of the tenancy, for possession and damages for unlawful detention, a claim for rent accrued is joined in the complaint, and the cause goes to trial upon such complaint, it is not error in instructing the jury as to the amount of recovery, to treat such joinder as proper.

SUPREME COURT.—*Modification of Judgment.—Bill of Exceptions.*—The overruling of a motion to modify a judgment will not be reviewed by the Supreme Court, unless the reasons, which were given in support of the motion, are shown by bill of exceptions.

From the Jay Circuit Court.

*D. T. Taylor* and *J. M. Smith*, for appellant.

*W. C. Ladd*, *W. H. Williamson*, *W. A. Thompson* and *J. W. Thompson*, for appellee.

BLACK, C.—The appellee sued the appellant to recover possession of real estate unlawfully held over by the latter after determination of his tenancy by ten days' notice to quit for non-payment of rent, and to recover damages for the unlawful detention of the premises and unpaid rent accrued before the determination of the tenancy.

A jury rendered a verdict for the appellee, assessing his damages at $192.41. Motions made by the appellant for a new trial, in arrest of judgment, and to modify the judgment which was rendered on the verdict, were overruled.

In this court the appellant has assigned as errors:

"1st. The appellee's amended complaint does not state facts sufficient to constitute a cause of action.

"2d. The court erred in overruling the motion for a new trial.

"3d. The court erred in overruling the motion in arrest of judgment.

"4th. The court erred in overruling the motion to modify the judgment.

"5th. The court erred in rendering judgment in favor of appellee for $192.41.

"6th. The court erred in rendering judgment for appellee for possession of the premises."

The lease under which the appellant received and held possession of the real estate was filed as an exhibit to the complaint, and the only objection to the complaint made in argument, under the first and third specifications in the assignment of errors, is, that the property (very accurately described in the complaint) was not sufficiently described in the lease.

The complaint, so far as it was sought therein to recover possession and damages for unlawful detention, was not founded on the lease, within the meaning of section 362, R. S. 1881, and it was not necessary, in order to make the complaint show a cause of action, that the lease, or a copy thereof, should be filed with the pleading; and, under many decisions of this court, it cannot be examined in determining the question of the sufficiency of the complaint, as a complaint for possession and damages for detention. If any cause of action was shown by the allegations of the complaint, without the aid of the exhibit, the objection, based upon the contents of the exhibit, can not avail.

The appellee sought also the recovery of unpaid rent accrued up to the time when the possession became unlawful. The premises were described in the lease as the appellee's "brick store-room." The appellant took possession and held

the property as the tenant of the appellee, under the lease. This was alleged in the complaint. The tenant could not escape payment, according to the terms of the lease, of rent for the time he occupied thereunder, upon the ground that the premises mentioned in the contract were not described therein as to their location. We need not decide whether the description in this lease would be sufficient for the purpose of every action that may be based upon a lease. Neither need we decide whether, without the filing of the lease, or a copy thereof, the complaint would have been good as a complaint for use and occupation. The lease was a sufficient exhibit to the complaint regarded as a complaint founded thereon, for the recovery of rent.

The complaint was not objectionable on the ground suggested by counsel.

It is claimed that the admission of the lease in evidence over appellant's objection, which was assigned as a cause for a new trial, was error, because of the alleged insufficiency of the description of the premises. It was admissible to show the origin of the tenancy terminated by notice to quit for failure to pay rent, and also to prove the contract of the parties as to the rent, both to show the amount of rent accrued under the lease and as evidence of the amount of damages for the unlawful detention of the premises.

It is urged that the court erred in admitting in evidence, over appellant's objection, the written notice to quit for non-payment of rent; the objection suggested here being that the description of the premises in the notice, which was a full and accurate description, was not in the terms of the description in the lease, or in all respects in the terms of the description in the complaint. The notice described certain premises held by the person to whom it was given, as the tenant of the person who gave it, with sufficient certainty to fully apprise the recipient as to what premises were demanded. This was all that was needed.

What has been said also disposes of the objection to cer-

tain testimony showing the location of the premises, the reason alleged against which is, that the property was not sufficiently described in the lease. It was proper to admit evidence of location corresponding with the description contained in the complaint.

Some of the questions propounded to a witness were objected to by the appellant, on the ground that they were leading. We have examined these questions and do not find them liable to such objection. It would not be profitable to take the space necessary to set them out in this opinion.

It is claimed that certain testimony, showing the service of the notice to quit, was improper, because of the alleged insufficiency of the notice above mentioned. As we have seen that the notice was not improperly admitted, it could not be improper to prove the service thereof.

The motion for a new trial was based, in part, upon the giving of certain instructions to the jury, of which the sixth and eighth alone are, in argument, claimed to have been erroneous. In the sixth instruction the court, after describing how a tenancy may be determined for non-payment of rent by notice and failure to pay, told the jury that where a tenancy has been so terminated, the landlord would be entitled "to the possession, and to recover his rent due and unpaid, and damages for the detention of premises after the termination of the lease."

In the eighth instruction it was said that, in determining what amount of damages, if any, the plaintiff was entitled to recover, "you should consider the amount of rent, if any, due at the time said lease was terminated, to which you should add such damages as have accrued to the plaintiff by reason of the unlawful detention after the expiration of the lease."

It is contended, by way of objection to these instructions, that in an action by a landlord against his tenant, holding over after the determination of the tenancy by notice to quit for non-payment of rent, the measure of damages is the reasonable rental value of the premises, from the time at which

the holding became unlawful until the time of trial; and that the appellee could not recover in this action the rent due and unpaid at the time at which the holding became unlawful.

It is true, that where a tenancy has been so terminated the landlord is entitled to recover damages for the unlawful detention, and that he is also entitled to recover rent due and unpaid which accrued while the holding was lawful. It is also true, that the recovery of damages for the unlawful detention is, by the statute, made an incident of the summary proceeding to recover the possession of the premises. Sections 5225, 5231, R. S. 1881.

In the appellee's complaint he showed a right of action for rent accrued under the lease, and also showed a right of action for the recovery of the possession of the premises and damages for the unlawful detention thereof. If this was a misjoinder of causes of action, the defendant, by demurring to the complaint for such ground of demurrer, would have procured the docketing of separate actions, if the demurrer had been sustained; if it had been overruled, this court could not have reversed the judgment because of such ruling. R. S. 1881, section 341.

The cause having gone to trial upon such complaint, it was not error to instruct the jury as was done in the sixth and eighth instructions.

The court refused to give certain instructions asked by the appellant. It is sufficient to say of these that they were not applicable to the evidence.

A new trial was also asked on the alleged grounds that the damages were excessive, and that the amount of the recovery was too large. In support of these causes it is sought to show that the amount awarded by the jury included rent accrued before the termination of the tenancy. If what we have said in regard to the sixth and eighth instructions is correct, the amount of the verdict was not too large.

The only other alleged cause for a new trial mentioned in

argument was that the verdict was not sustained by sufficient evidence. The evidence fully sustained the verdict, and there was no evidence of a contrary tendency. The defendant offered no evidence, and the defence appears to be wholly without merit.

The grounds of the motion to modify the judgment are not shown by bill of exceptions, and the ruling upon the motion, therefore, can not be examined.

The fifth and sixth specifications in the assignment of errors present no question for decision.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed Oct. 19, 1883.

---

No. 10,454.

## THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY *v.* SMITH.

RAILROADS.—*Highway Crossings.—Duty of Railroad Company.—Construction of Statute.*—Under a fair construction of section 3903, R. S. 1881, it is the duty of a railroad company to construct its road, where it intersects with any public highway, in such manner as to afford security for life and property; and this is so, whether the highway is laid out and opened before or after the construction of the railroad.

SUPREME COURT.—*Weight of Evidence.*—Where there is evidence in the record tending to sustain the verdict on every material point, the Supreme Court will not reverse the judgment on the weight of the evidence.

SAME.—*Questions to Witness.—Objection and Exception.—Exclusion of Evidence.—Error.*—The error of the court, if such it be, in sustaining an objection to a question to a witness, though an exception be saved to the ruling, is not an available error in the Supreme Court for the reversal of the judgment, unless it appear from the record that the party informed the trial court at the time what evidence he expected to elicit by the answer to the question, and that the court erred in the exclusion of such evidence.

From the Lawrence Circuit Court.

91 119
140 278
143 351

91 119
149 278

91 119
158 192

91 119
159 519

91 119
160 131

91 119
161 510

91 119
166 223

91 119
170 319

*G. W. Friedley, E. D. Pearson* and *H. H. Friedley*, for appellant.

*J. W. Buskirk* and *H. C. Duncan*, for appellee.

HOWK, J.—The first error complained of by the appellant in this case is the overruling of its demurrer, for the want of sufficient facts, to appellee's complaint. In his complaint the appellee alleged, in substance, that on October 20th, 1881, the track of appellant's railroad crossed the public highway leading from Bloomington to Ellettsville, in Monroe county; that at such crossing the appellant undertook to keep the same in good repair for the use of the public; that, on the day named, appellant permitted such crossing to get out of repair and become dangerous to cross; that the appellee, not knowing of the defective condition of such crossing, on the day named, and being a traveller on said highway, undertook to cross appellant's railroad track with his wagon and team of two horses, when, on account of such defective crossing, the appellee's horse, which he was driving, became fast between the rail of appellant's track and the timber across such highway, and in trying to extricate himself, without appellee's fault, was violently thrown to the ground, by which he was damaged and rendered wholly worthless, to appellee's damage $100, for which sum he demanded judgment.

In discussing the sufficiency of this complaint, the first objection thereto of appellant's counsel is thus stated in their brief: "It assumes, as will be seen, that it was the duty of the railroad company to keep the highway at the crossing in good repair. When a highway is laid out crossing a railroad, the public, we take it, assume all the risks incident to the crossing." We are not inclined to approve of or adopt this position of counsel. In section 3903, R. S. 1881, in force since May 6th, 1853, it is provided as follows in relation to railroad companies: "Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions expressed in the special powers following: * * *

"*Fifth.* To construct its road upon or across any stream of water, watercourse, road, highway, railroad, or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

The appellant's counsel claim, however, that these statutory provisions are not applicable to the case in hand, because, they say, "The complaint does not show, nor, in point of fact, is it pretended, that the highway has not grown into use since the railroad was built." In other words, it is claimed by counsel, as we understand them, that the clause of the statute quoted is applicable only to the original construction of appellant's railroad across highways then in existence, and does not apply to a case, where it may be assumed, for the want of an averment to the contrary, that the highway was laid out and opened across the railroad after its construction. We do not think that the clause of the section quoted should receive from the courts any such literal or limited construction in the interests either of the public or of the railroad company. Whether the highway is laid out and opened before or after the construction of the railroad, the legislative intent in the clause quoted is clear, we think, that the railroad company shall construct its road, at its intersection with such highway, "in such manner as to afford security for life and property." This construction of the statute will subserve the interests of the railroad company, as it seems to us, in the preservation of its trains from possible destruction, and in the safety of its employees and passengers. In *Indianapolis, etc., R. R. Co.* v. *Stout*, 53 Ind. 143, the first paragraph of appellee's complaint charged negligence in the construction of the crossing over a certain highway, west of Indianapolis, and that such negligent and defective construction of the crossing caused the injuries which resulted in the death of the appellee's intestate.

The court said: "We think the first paragraph was good. *Mackay* v. *N. Y. C. R. R. Co.*, 35 N. Y. 75; *Richardson* v. *N. Y. C. R. R. Co.*, 45 N. Y. 846; Shearman & Redfield on Negligence (3d ed.), secs. 448, 451."

Appellant's counsel claim that there is no averment in the complaint that the appellee was without fault; but, on this point, the record shows that counsel are mistaken. The other objections to the complaint pointed out by the appellant are such as could not be reached by its demurrer, and we need not consider them.

For the reasons given, the court did not err, we think, in overruling the demurrer to the complaint.

Under the alleged error of the court, in overruling the motion for a new trial, the appellant's counsel first insist that the verdict of the jury was not sustained by sufficient evidence. There is evidence in the record which tends to sustain the verdict on every material point in issue between the parties. There was some conflict in the evidence, it is true, but the jury, who saw and heard the witnesses testify, evidently believed the appellee's evidence, as they had the right to do, for they returned a verdict in his favor. The learned judge, under whose eye and in whose hearing the trial was had, upon a proper motion made, refused to set aside the verdict and grant a new trial. In such a case, as we have often decided, we can not disturb the verdict on the mere weight of the evidence. *Fort Wayne, etc., R. R. Co.* v. *Husselman*, 65 Ind. 73.

Appellant's counsel next complain of the rulings of the court in sustaining appellee's objections to two questions propounded by them to a witness for the appellant, on his direct examination. The record shows that an exception was saved to each of these rulings, but it fails to show that the appellant informed the court what evidence it was expected to elicit from the witness by his answers to such questions. In *Mitchell* v. *Chambers*, 55 Ind. 289, this court said: "Where, as in this case, the record shows only that certain questions were propounded to certain witnesses, and does not show the par-

ticular evidence which it was expected would be elicited by the answers to such questions, we can not say from the record that the court below erred in sustaining the objections to such questions." *Graeter* v. *Williams*, 55 Ind. 461; *Cole* v. *Kidd*, 80 Ind. 563; *Bake* v. *Smiley*, 84 Ind. 212.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed Oct. 20, 1883.

No. 10,446.

## COMBS *v.* NELSON.

MORTGAGE.—*Deed.—Agreement.—Recording.—Title.—Equity.*—A., holding land by certificate of purchase from a commissioner appointed to sell, assigned the certificate to B., as security for a debt to B., with agreement that B. should take a deed in his own name and hold the title as security.

*Held*, that the transaction had the effect of a mortgage from A. to B., which the latter could foreclose against a grantee of a purchaser from the administrator of A.

*Held*, also, that an answer that the deed to B. was not recorded, and that without notice of the deed the defendant purchased, was bad on demurrer.

*Held*, also, that it is the legal title only, and not a mere equity, that is protected against a deed not recorded.

PRACTICE.—*Removal of Cause to U. S. Court.*—Without a bond conditioned as required by the act of Congress, a cause can not be removed from a State court to the U. S. Circuit Court.

From the Posey Circuit Court.

*E. M. Spencer* and *H. C. Pitcher*, for appellant.

*W. P. Edson*, *A. P. Hovey* and *G. V. Menzies*, for appellee.

BICKNELL, C. C.—This was a suit by the appellee against the appellant and Julia, his wife, to foreclose a mortgage.

The complaint averred that the appellee, in 1872, bought land at a commissioner's sale and paid for it and took a certificate of purchase; that in 1873 he assigned the certificate to

Samuel Nelson; that in 1875 said Samuel Nelson was indebted to the appellee in the sum of $579.10; that to secure said indebtedness said Samuel surrendered and delivered to the appellee the said certificate, with an agreement that the appellee should take the commissioner's deed thereon in his own name as security for said indebtedness; that the appellee accordingly, in November, 1875, received such deed from said commissioner; that afterwards Samuel Nelson died; that said indebtedness is still unpaid; that the administrator of said Samuel sold the land to Julia Dean, who afterwards married the appellant; that she and her said husband sold the land to Henry C. Pitcher, who reconveyed it to the appellant.

At the August term, 1881, said defendants jointly demurred to the complaint, for want of facts sufficient. Their demurrer was overruled. The complaint was then amended by making Inez Dean a codefendant. On the first day of the November term, 1881, the defendants Julia Combs and Inez Dean filed a disclaimer.

On the second day of said November term the appellant filed a verified petition for the removal of the cause to the circuit court of the United States, for the reason that the parties were citizens of different States, the appellant being then, and having been at the commencement of the suit, a resident of Texas. This petition was overruled.

The appellant then answered in two paragraphs, to wit:

1. The general denial.

2. Admitting the execution of the deed to the appellee by the commissioner, and averring that said deed was not recorded until 1881, and that in 1880 said Julia Dean bought the land from said Samuel Nelson's administrator without notice of said deed, and that before said deed was recorded, she and the appellant, whom, in the mean time, she had married, conveyed the land to Henry C. Pitcher for a valuable consideration, and that the appellant, without notice of said deed, repurchased the land from said Pitcher on November 5th, 1880.

The appellee's demurrer to the said second paragraph of

answer was sustained. The appellant then withdrew the general denial, and refused to amend said second paragraph, and final judgment was rendered for the appellee, foreclosing the mortgage.

The appellant assigns errors as follows:

1st. Overruling the demurrer to the complaint.

3d. Sustaining the demurrer to the second paragraph of the answer.

2d. Overruling the petition for the removal of the cause.

4th. Taking the complaint of the plaintiff as confessed and rendering a decree upon said complaint *pro confesso*.

Under the fourth specification of error, the appellant, in his brief, suggests that a valid final judgment could not be rendered upon the demurrer to the second paragraph of the answer while the general denial was in. But the record, as corrected upon *certiorari*, shows that the general denial was withdrawn, and that after the demurrer to the said second paragraph was sustained, the complaint was taken as confessed and due proof made. There was no error in this respect.

The only objection urged against the complaint under the first specification of error is, that it shows an attempted conveyance of real estate by parol, which is void by the statute of frauds. R. S. 1881, section 4904. But the complaint does not show a contract for the sale of lands; it states a valid mortgage. *Butcher* v. *Stultz*, 60 Ind. 170; *Haywortb* v. *Worthington*, 5 Blackf. 361 (35 Am. Dec. 126). There was no error in overruling the demurrer to the complaint.

As to the second specification of error, there can be no removal of a cause from a State court to the circuit court of the United States, on the ground that the parties are citizens of different States, without such a petition and bond as the statutes of the United States require.

The question whether the application for removal is sufficient under the statute, is within the jurisdiction of the State courts. *Indianapolis, etc., R. W. Co.* v. *Risley*, 50 Ind. 60;

*Baltimore, etc., R. W. Co.* v. *New Albany, etc., R. R. Co.*, 53 Ind. 597; *McWhinney* v. *Brinker*, 64 Ind. 360; *Sharp* v. *Gutcher*, 74 Ind. 357. The application in this case was governed by the act of March 3d, 1875, Acts U. S. 1875, p. 471, section 3. The revision of the statutes of the United States, adopted in 1878, is only *prima facie* evidence, and does not control in case of discrepancy the effect of any original act as passed by congress since the 1st day of December, 1873. 20 U. S. Stat. At Large, p. 27; *Sharp* v. *Gutcher*, *supra*.

Section 3 of the act of 1875, *supra*, is as follows: "That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit, * * shall desire to remove such suit, * * * he or they may make and file petition in such suit in such State court * * * * and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, * * * it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit," etc.

With the petition in the present case the following undertaking was filed:

"Whereas, Wm. F. Combs has petitioned the Posey Circuit Court, in the State of Indiana, for the removal of a certain cause therein pending, wherein William Nelson is plaintiff and said Wm. T. Combs is defendant, to the circuit court of the United States for the District of Indiana: Now, therefore, we undertake to pay all costs which may be awarded by said circuit court of the United States, provided said court shall hold that the suit was wrongfully or improperly removed thereto. Witness our hands and seals this 14th day of November, 1881. (Signed) WM. F. COMBS.

"JOHN GREGORY."

This undertaking was not sufficient; it omitted one of the essential conditions prescribed by the statute, to wit, that a

copy of the record should be filed in the circuit court of the United States on the first day of its then next session. There was no error in overruling the petition for removal.

The second paragraph of the appellant's answer presented no bar to the foreclosure of the mortgage. The appellant, and those under whom he claimed, had no equity as against the mortgage. There was nothing on record showing title in Samuel Nelson; the apparent legal title was in William Nelson, the appellee, but, in equity, that apparent legal title was, in effect, only a mortgage, and Samuel Nelson was the equitable owner of the land, subject to the mortgage. The sale by Samuel Nelson's administrator conveyed no more than Samuel himself could have conveyed; at such a sale there is no warranty, but the purchaser takes the interest of the decedent, whatever it may have been.

In *Wright* v. *Shepherd*, 47 Ind. 176, it was held that where A. held a certificate of purchase of canal lands, which he afterwards assigned and delivered to B., no interest in such lands descended to the heirs of A., and that a conveyance by such heirs to C. would pass no title. There, as in the present case, the assignee of the certificate had obtained a deed thereon; there, after the death of the assignor of the certificate, his heirs conveyed the land; here, after the assignor's death, his administrator conveyed the land; there the court held that the grantee of the heirs could not recover the land from one who acquired title through B., although the deed of B. was not placed on record within the time limited by law, and was not on record when the deed from the heirs of A. to C. was recorded. The court said, after the assignment of the certificate A. had no interest in the land. So, here, Samuel Nelson, after the making of the mortgage, had no interest that would descend to his heirs, except subject to the mortgage, and his administrator had nothing in the land to sell except as subject to the mortgage.

It was also held in the case just cited, that the law relating to the recording of deeds has no reference to equities, and that

the plaintiff in that case, having purchased what could under no circumstances have been more than an equity, could not claim the property, as against the holder of the legal title, merely because such holder had failed to record his deed within the time limited by the statute.

There was no error in sustaining the demurrer to the second paragraph of the answer.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Oct. 19, 1883.

---

No. 10,033

## WALLACE ET AL. *v.* LAWYER ET AL.

EXECUTION.—*Proceedings Supplementary.—Practice.*—In proceedings supplementary to execution, formal pleadings are not required, and rulings thereon are immaterial and harmless.

SAME.—*Evidence.*—Proceedings supplementary, based on the averment that the execution defendant conceals his property and wrongfully refuses to apply it, etc., are not sustained by proof only that he has real estate within reach of execution, and that debts are due him.

From the Hamilton Circuit Court.

*W. Garver, R. Graham, D. V. Burns* and *C. S. Denny*, for appellants.

*T. J. Kane, T. P. Davis, G. Shirts, A. F. Shirts* and *W. R. Fertig*, for appellees.

HAMMOND, J.—This was a proceeding supplementary to execution, by the appellants against the appellees, under sections 815 and 819, R. S. 1881. The complaint alleges that, on November 1st, 1871, Joseph Randall recovered judgment in the superior court of Marion county, against the appellees Peter C. Lawyer and Edward K. Hall, for $692.74 and costs. The judgment is averred to be wholly unpaid. Randall as-

signed it, July 30th, 1874, to the appellant Andrew Wallace, who afterwards assigned it to his wife, the appellant Rachel Wallace. An execution was issued on the judgment in September, 1874, and directed to the sheriff of Hamilton county, where the execution defendants then, and at the commencement of this action, resided. The execution was returned at the proper time unsatisfied. It is alleged that Lawyer and Hall have property, means and effects sufficient to satisfy the judgment, but unjustly and wrongfully refuse to apply the same to the payment thereof, and so conceal the same that nothing can be reached by execution.

The complaint also charges that the appellee John Collett is indebted to Lawyer, and has in his custody and under his control a large sum of money belonging to Lawyer, which, together with other property, claimed by Lawyer, exceeds the amount allowed by law as exempt from execution. It is further averred in the complaint that the appellee Lewis Gerhard is indebted to Lawyer in a sum of money greatly in excess of the amount allowed by law as exempt from execution. It is further alleged that the appellee Asher G. Walton claims some pretended interest in the judgment, and he is made a party to answer as to such interest.

The appellees severally demurred to the complaint, but their demurrers were overruled. They then answered in abatement in two paragraphs, verified by the affidavit of Lawyer. The second paragraph was stricken out on the appellants' motion, and their demurrer to the first paragraph was overruled, and to this they reserved an exception. They replied in two paragraphs. The second was a denial, and to the first the appellees' demurrer was filed and sustained, and to this ruling the appellants excepted.

The case was tried by the court, resulting in a general finding for the appellees, followed by a judgment in their favor for costs. The appellants' motion for a new trial, on the grounds that the finding was not sustained by the evidence

and was contrary to law, was overruled. The appellants excepted. The evidence, all introduced by the appellants, is in the record. It consists of the record of the judgment, an execution issued September 5th, 1874, the officer's return thereto showing no property found, and an execution issued September 23d, 1881. It also contains the examination under oath of Lawyer, who testified that he owned a house and lot in Hamilton county, unincumbered, of the value of $800; that he had a tax title on twenty acres of other land in that county on which he had paid taxes to the amount of $350; that he had also purchased 158 acres of land in the same county and paid $2,600 on it, and had a deed, but it was not on record; that he could give a description of the land by going to the record. He also stated that Mr. Collett owed him about $200.

The appellants assign for error in this court the overruling of their demurrer to the first paragraph of the appellees' answer, the sustaining of the appellees' demurrer to the first paragraph of their reply, and the overruling of their motion for a new trial.

It is manifest from the record that the appellees' plea in abatement was ignored by the court and the parties, and that the case was tried upon its merits.

Section 822, R. S. 1881, in reference to proceedings supplementary to execution, provides, *inter alia*, that "all proceedings under this act, after the order has been made requiring parties to appear and answer, shall be summary, without further pleadings, upon the oral examination and testimony of parties and witnesses."

Considering that an answer to a complaint in such case is not required, and that the answer filed by the appellees was disregarded, we think that the error, if any, of the court in overruling the demurrer to the answer and sustaining the demurrer to the reply, was entirely harmless. In this court we are required to overlook defects in the proceedings of the trial court where the merits of the case have been fairly tried

and determined. Section 658, R. S. 1881; *State, ex rel.*, v. *Parish*, 83 Ind. 223.

This leaves for consideration the simple question whether there was error in overruling the appellants' motion for a new trial.

The appellants charge in their complaint that the execution defendants Lawyer and Hall have property, means and effects sufficient to satisfy the appellants' judgment, but wrongfully refuse to apply the same to the payment thereof, and conceal such property so that it can not be seized by execution. The evidence fails to prove these averments of the complaint. The only property shown to belong to the execution defendants is that owned by Lawyer. It was real estate, and no reason appears why an execution would not reach it, without resorting to the present proceedings. As to the other appellees being indebted to Lawyer or Hall, as charged in the complaint, there is no evidence of such indebtedness except that "Mr. Collett" owed Lawyer "about $200." The evidence upon this point was not sufficient to enable the court to act definitely and intelligently in making an order requiring Collett to apply his indebtedness to Lawyer as payment on the appellants' judgment.

We think that the court below found correctly on the evidence, and properly overruled the motion for a new trial.

Judgment affirmed, at the appellants' costs.

Filed June 30, 1883.

## On Petition for a Rehearing.

Hammond, J.—A careful re-examination of the record satisfies us with the conclusions reached in the principal opinion.

That the plea in abatement was disregarded by the parties and the court, is shown in the fact that no evidence whatever was introduced in reference to it. The appellants introduced evidence evidently with the view of making out their case on its merits, and the finding and judgment of the court were as upon the merits of the case, and not in abatement.

In proceedings supplementary to execution the evidence must sufficiently describe the property sought to be reached and the claims owing the execution defendant, to enable the court, in its judgment, to direct what property shall be levied upon and sold, and what indebtedness due the execution defendant shall be applied to the payment of the judgment against him. In these respects the evidence was not sufficient.

Petition for a rehearing overruled.

Filed Oct. 17, 1883.

---

No. 9516.

## MORGAN *v.* HAYS.

91 132
130 429
91 132
153 89

BILL OF EXCEPTIONS.—*Amendment of.*—*Record.*—*Rule of Court.*—A bill of exceptions may be amended to correct an error therein, by order of court, after the term at which it has been signed and filed, if there be a record, memorial or minute of the transaction, of equal or prior date, upon which the amendment can be based, as where the date of the adoption of a rule of court appears of record, but is erroneously stated in the bill.

From the Dearborn Circuit Court.

*J. D. Haynes, J. K. Thompson* and *W. S. Holman*, for appellant.

*H. D. McMullen* and *D. T. Downey*, for appellee.

NIBLACK, C. J.—This was a complaint in the nature of a motion to amend a bill of exceptions.

From the complaint, which consists of several papers and copies of proceedings grouped together in a very informal way, we deduce a summary of the facts relied on for relief as follows:

On the 3d day of February, 1879, William Morgan, the appellant in this case, commenced an action in the court below against Ezra G. Hays, the appellee, upon a promissory note. A jury having disagreed at the ensuing February term, the cause was continued until the April term following. Dur-

ing the latter term the appellee filed his affidavit for a change of the trial from the regular judge. The application was overruled, upon the ground that under a rule which had been adopted on the 23d day of April, 1877, it came too late. Afterwards the appellant obtained a verdict and a judgment against the appellee for the amount of the note in suit. The appellee thereupon appealed that cause to this court, and in preparing and signing a bill of exceptions containing the evidence and other proceedings, not appearing of record in the cause, it was by inadvertence and mistake made to appear that the rule concerning changes of venue referred to was adopted on the 23d day of April, 1879, and the bill of exceptions embracing this mistaken date was copied into the transcript and made a part of the record in this court. *Hays* v. *Morgan*, 87 Ind. 231.

Upon these facts the appellant prayed an order correcting the bill of exceptions as to the date of the adoption of the rule in question, the true date of which was a matter of record in the Dearborn Circuit Court.

The appellee demurred to the complaint, and his demurrer was sustained, upon which final judgment was rendered against the appellant.

It is within the power of the circuit, and other *nisi prius* courts of the State, to amend a bill of exceptions after it has been signed and made a part of the record, and after the close of the term at which it was signed, where a proper case for the amendment of a record is made.

To make such a case there must be some memorandum, memorial paper, record, or other minute of the transaction to amend by, of a date prior to, or at least of equal date with, the bill of exceptions. Buskirk Prac. 155; *Jenkins* v. *Long*, 23 Ind. 460; *Makepeace* v. *Lukens*, 27 Ind. 435; *Hamilton* v. *Burch*, 28 Ind. 233; *Uland* v. *Carter*, 34 Ind. 344; *Beavers* v. *State*, 58 Ind. 530; *Hannah* v. *Dorrell*, 73 Ind. 465; *Firestone* v. *Firestone*, 78 Ind. 534; *Williams* v. *Henderson*, 90 Ind. 577.

Courts are required to take judicial knowledge of their own rules, and in this case the court had the order-book entry of the adoption of the rule, concerning which the mistake in the date was made, before it, and, consequently, had a record to amend by, of prior date to the bill of exceptions.

We see no substantial objection to the sufficiency of the complaint.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed Oct. 20, 1883.

---

No. 9141.

## THE BROOKVILLE AND METAMORA HYDRAULIC COMPANY *v.* BUTLER ET AL.

91 134
124 580
125 480
125 513
91 184
133 164
91 134
134 913
91 134
154 224
155 481
155 482
155 484
91 134
162 396
91 134
166 155

EASEMENT.—*Right to Overflow Land.—Ownership of Ice Formed There.*—The owner of an easement to overflow another's land is not entitled to the ice which forms on the water covering the land; such ice belongs to the owner in fee.

SAME.—*White Water Valley Canal.—Right to Take Ice Found on Overflowed Land.*—In constructing the White Water Valley Canal, a large pond producing ice on low lands adjoining and beyond the canal was formed by the flow of water from the canal, the lands covered by which pond had been used by the State and its grantee, the canal company, only for the purpose of overflow. The plaintiff was the grantee of the "canal and its appurtenances."

*Held*, that only the right to overflow, and not the land overflowed itself, was appurtenant to the canal, and that the right to gather ice upon the pond did not belong to the plaintiff, but to the owner of the soil, subject to the condition that no injury should be done to the easement of the plaintiff, and that the quantity of water should not be materially lessened.

From the Decatur Circuit Court.

*J. D. Miller*, *F. E. Gavin*, *H. Berry*, *F. Berry*, *B. F. Claypool*, *L. T. Michener* and *T. B. Adams*, for appellant.

*J. S. Butler*, for appellees.

ELLIOTT, J.—Under the general internal improvement act

of 1836, the State, in 1837, for the purposes of constructing a canal, seized land then owned by the heirs of Charles Collett. During that year, and prior to 1842, work was done upon the canal by the State; at the session of the Legislature of the year 1842 a corporation was created named the White Water Valley Canal Company, and all the right and title of the State to the land seized was vested in that corporation; the canal was afterwards completed and was operated by the grantee of the State until the year 1865; in December of that year the canal company conveyed its estate in the canal and appurtenances, reserving, however, all water power and all water rights owned by itself or its lessees; the grantee of the canal company leased to the appellant all the unoccupied water on that part of the canal which is upon the land once owned by the Collett heirs; on that land there was a low piece of ground through which the canal passed; upon this low piece, and immediately adjoining the bank of the canal, is a large pond formed by the water thrown from the channel of the canal; on this pond ice formed in the winter of 1878 and 1879, and was cut and appropriated by the appellees, who were the defendants below.

It is within the power of the Legislature to authorize the seizure of the fee, when that estate is required for the public purpose. When the fee is taken, the owner must be awarded, as compensation, the value of that estate. Our cases declare that the act of 1836 authorized the seizure of the fee, and that this was the estate taken by the State and transmitted to the grantees. *City of Logansport* v. *Shirk*, 88 Ind. 563; *Cromie* v. *Board, etc.*, 71 Ind. 208; *Nelson* v. *Fleming*, 56 Ind. 310; *Water Works Co.* v. *Burkhart*, 41 Ind. 364. It is not without reluctance that we yield to the rule declared in these cases, but we feel that it has become a rule of property which we should not change.

It is not necessary that one claiming an estate in land by virtue of an appropriation made by the State, under the right of eminent domain, should affirmatively show that compen-

sation has been paid, where it appears that the land-owner filed no claim within the time limited by law. If a claim is not filed within the time limited, it is regarded as having been waived. *Nelson* v. *Fleming, supra;* Cooley Const. Lim. (5th ed.), top p. 695.

The State had a right to take and transmit a fee upon due compensation, and as no claim was filed within the time limited, and possession has been held by the State and her grantees for a period of more than forty years, we must conclude that a fee to the canal did vest in the appellant as the grantee of the State.

The title which the appellant acquired was to the canal and its appurtenances. *Sheets* v. *Selden*, 2 Wal. 177. If the land on which the ice formed can be deemed an appurtenance, then the State acquired and transmitted it to her grantee. But land can never be appurtenant to land. This old rule, old as the law itself, forbids the conclusion that the land passed as an appurtenance.

The right to flow lands conveys no right to the land itself; it vests a mere easement in the possessor. The right which the canal company had in the land adjoining the channel of the canal was an easement, and nothing more. The pond which formed is not shown to have been a reservoir or basin of the canal, nor to have constituted any part of the channel. All that can be inferred from the use of the low ground by the appellant and its grantors is that there existed a right to overflow it. A prescriptive right can never be broader than the claim evidenced by user. Phear Rights of Water, 90.

The appellant owns an easement vesting in it a right to do whatever the owner of an easement to overflow another's land may rightfully do; the owners of the fee possess the right to do all acts which a land-owner may lawfully do, not inconsistent with, or injurious to, the easement. The former as owner of the dominant estate has all the rights that such an estate confers; the latter all the rights of an owner of land burdened with an easement.

We come to the decisive question: Is the owner of an easement to flow another's land entitled to the ice which forms on the water covering the land? There is some diversity of opinion upon this question, but our decisions declare that the ice belongs to the owner of the servient estate. In *State* v. *Pottmeyer*, 33 Ind. 402 (5 Am. R. 224), the question was examined thoroughly, and it was held that the land-owner might cut the ice, provided no injury was done to the rights of the owner of the dominant estate; and this was the decision in *Edgerton* v. *Huff*, 26 Ind. 35. This last case has, it is true, been overruled upon one point, but not upon the point to which it is here cited. Again, in *Julien* v. *Woodsmall*, 82 Ind. 568, this question came before the court, and it was held that the right to overflow the land of another for mill purposes did not confer the right to cut the ice formed on the pond. The doctrine of these cases is consistent with long established principles, and is supported by analogous cases. The owner of a servient estate has a right to all the profits which may arise from the soil, and may make such a use of the soil as is not inconsistent with the easement. In the old case of *Goodtitle* v. *Alker*, 1 Burr. 133, it is said that "The owner of the soil has a right to all above and under ground, except only the right of passage, for the king and his people." This general doctrine applies to a private way. Gates may be erected across it, wells may be dug on it, water ways may be constructed under it, sea weed may be gathered off of it, and herbage may be cropped from it. *Bean* v. *Coleman*, 44 N. H. 539; *O'Linda* v. *Lothrop*, 21 Pick. 292; *Baker* v. *Frick*, 45 Md. 337 (24 Am. R. 506); *Emans* v. *Turnbull*, 3 Am. Dec. 427, n. An admirable statement of the rule is that of the court in *Maxwell* v. *McAtee*, 9 B. Mon. 20. There, in speaking of the grant of an easement, it was said: "Notwithstanding such a grant, there remains with the grantor the right of full dominion and use of the land, except so far as a limitation of his right is essential to the fair enjoyment of the right of way which he has granted. It is not necessary that the grantor should ex-

pressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him because they are not granted. And for the same reason the exercise of any of them can not be complained of by the grantee, who can claim no other limitation upon the rights of the grantor, but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment." The right of a mill-owner to pond water on another's land, the right of one owner to use another's land for a sluice way, the right of one owner to use another's land for drainage purposes, are all easements, and nothing more. *Baer* v. *Martin*, 8 Blackf. 317; *Snowden* v. *Wilas*, 19 Ind. 10. Easements do not take from the owner of the fee the right to make any profitable use he can of his property not inconsistent with the enjoyment of the dominant estate. It is immaterial whether the easement is to flow water over the land or to pond it on the land, in either case, as said in *Mason* v. *Hill*, 5 B. & Ad. 1, the owner of the fee may use it for "profitable purposes." Such a right is said to be "a privilege without profit." *Earl* v. *DeHart*, 1 Beasley, 280. The right to back or pond water on the land of another, whether acquired under the statute or by prescription, gives no right to the land itself, nor to the profits which a use of it, not injurious to the easement, will produce. *Williams* v. *Nelson*, 23 Pick. 141; *Paine* v. *Woods*, 108 Mass. 160; *Storm* v. *Manchaug Co.*, 13 Allen, 10. The close analogy between the class of cases to which we have referred and those of *State* v. *Pottmeyer*, *supra*, and *Edgerton* v. *Huff*, *supra*, is very readily perceived, and is strong proof that the latter cases are founded on solid principle, for no one doubts that the former are well grounded in principle.

There are well considered cases directly sustaining the view adopted by our decisions. In *Dodge* v. *Berry*, 26 Hun, 246, it was held that a mill-owner who has the right to flow the lands of another, does not own the ice which forms over the lands of such person, and that the latter may take the ice unless he perceptibly injures the owner of the mill. The same

conclusion was reached in *Marshall* v. *Peters*, 12 How. Pr. 218. The court in *Washington Ice Co.* v. *Shortall*, 101 Ill. 46 (40 Am. R. 196), held that ice belonged to the owner of the fee, and in the course of the opinion said: "The views we hold are in accordance with the holding in *The State* v. *Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the right to prevent its removal." This doctrine is again held in *Village of Brooklyn* v. *Smith*, 104 Ill. 429 (44 Am. R. 90).

In *Paine* v. *Woods*, 108 Mass. 160, the court thus stated the law upon this subject: "The owner of the land thereby flowed must not indeed draw off by canals, aqueducts or ditches, the water which has been raised by the dam. *Cook* v. *Hull*, 3 Pick. 269; *Storm* v. *Manchaug Co.*, 13 Allen, 10. But he may use it for watering his cattle, or irrigating his crops and gardens, or any other reasonable purpose which does not practically and in a perceptible and substantial degree impair the right to run the mill; and so he may take and carry away the water when formed into ice, for use or sale, provided he does not thereby appreciably diminish the head of water at the dam of the mill-owner. *Cummings* v. *Barrett*, 10 Cush. 186. And his land may be of peculiar value by reason of its situation affording opportunities to do this. *Ham* v. *Salem*, 100 Mass. 350." These cases lend strong support to the doctrine which prevails in this court, and with the exception of the cases of *Mill River, etc., Co.* v. *Smith*, 34 Conn. 462, and *Myer* v. *Whitaker*, 5 Abbott N. C. 172, we have found none asserting a contrary doctrine. Of the latter case we need only say it is confessedly against the weight of authority, is condemned by the courts of the same State, is the decision of a single judge, and is not well reasoned. The decision in the first of these cases is that of a divided court, and the reasoning upon which it is founded is unsatisfactory. It proceeds thus: "Many of the mill ponds of the State, used in the grinding of grain and sawing of

timber, are small and shallow, and often in the winter season when rain falls infrequently and the fountains are frozen, water is scarce, and anything which further lessens it is a material injury." This seems to us a narrow view, and one not in harmony with authority or consistent with sound principle. It may possibly be that if the evidence in a particular case should show a diminution of the supply of water, the land-owner might then be prevented from taking ice; this, however, affords no ground for a broad general rule; the court has as little ground for presuming that taking the ice would diminish the supply of water, as for presuming that allowing a dozen, or a half dozen horses to drink from the pond would appreciably injure the owner of the easement. It is difficult, if not impossible, to reconcile the ruling in that case with the decision in the subsequent case of *Seeley* v. *Brush*, 35 Conn. 419; but, however this may be, we are clear that it is not a case which should be regarded as authority. It is a mistake to suppose that the case of *Higgins* v. *Kusterer*, 41 Mich. 318, S. C., 32 Am. R. 160, is against the views of this court, for nothing more is there decided than that parties may, by express contract, treat ice as personal property. It is said in that case that "there can be no doubt that the original title to the ice must be in the possessor of the water where it is formed;" and this is in harmony with our cases. In a later case in the same court, it was held that a riparian proprietor had a right to gather ice on a navigable river, and that the owners of a boat which carelessly destroyed it were liable. *People's Ice Co.* v. *Steamer "Excelsior,"* 44 Mich. 229, S. C., 38 Am. R. 246. The right of the riparian proprietor was likened to that of the owner of land adjoining a public road or street, and upon this basis was grounded his right to recover. This is the real foundation of our own cases, and they are, therefore, supported, indirectly, at least, by the one just cited. The case of *Wood* v. *Fowler*, 26 Kan. 682, S. C., 40 Am. R. 330, decides that where the stream is a navigable one, and the adjoining proprietor owns only to the bank, he has no superior claim to the ice;

but the court refers with approval to the cases which hold that where the riparian proprietor owns the land he also owns the ice.

Our conclusion is, that where the user is of such a character as to establish an easement to pond water on the land, or to use it as a water way for surplus water, the right to gather ice which forms on the pond is in the owner of the fee, and not in the owner of the dominant estate.

Judgment affirmed.

Filed Oct. 31, 1883.

---

No. 11,135.

## Sage *v.* The State.

91 141
154 669

91 141
e160 550

Criminal Law.—*Insanity.*—There is, according to the law of this State, no condition intermediate between sanity and insanity, which, though not excusing crime, may mitigate it. R. S. 1881, sections 1285, 1764, 1765. But independently of the plea of insanity in a criminal case, the defendant may show his general physical and mental condition at the time of the commission of the offence.

Same.—*Evidence.*—*Witness.*—*Opinion.*—A witness, not an expert, upon testifying to acquaintance with and frequently seeing the person whose sanity is in question, during a period of two years, may, without stating other facts, give his opinion concerning the question of sanity.

From the Blackford Circuit Court.

*J. Cantwell, S. W. Cantwell, W. A. Bonham* and *W. H. Carroll*, for appellant.

*F. T. Hord*, Attorney General, *C. W. Watkins*, Prosecuting Attorney, *J. Noonan* and *B. G. Shinn*, for the State.

Niblack, C. J.—This was a prosecution for murder in the first degree.

The indictment charged that the appellant, Eliza Sage, on the 18th day of June, 1882, feloniously, and with premeditated malice, killed and murdered one Harry Cunningham by throwing him into water and drowning him.

The appellant pleaded in writing: *First.* That she was not guilty as charged. *Secondly.* That at the time of committing the act charged as a crime she was of unsound mind.

The prosecuting attorney replied in denial of the plea of insanity. A jury found the appellant guilty of murder in the first degree, and fixed her punishment at imprisonment in the penal department of the Indiana Reformatory for Women and Girls during her life. A new trial being first denied, there was judgment upon the verdict.

It was made to appear by the evidence that Harry Cunningham, the person charged to have been murdered, was the illegitimate child of the appellant, whose maiden name was Cunningham, and was about sixteen months old at the time of his death; that the appellant was, at that time, about three months advanced in pregnancy resulting from illicit intercourse with one John Sage, who was willing, and had previously offered, to marry her if she could in some way get rid of the child, Harry.

At the inquest held by the coroner, the appellant made a confession to the effect that at the time and at the county charged, she took the child from her place of residence in Hartford City, a distance of over a mile, and threw it into a stream of running water, a short distance above where its body was found a few days later, for the purpose of drowning it, and that she had not since seen the child; that her motive in so causing the child to be drowned was to get rid of it as an impediment to her marriage with Sage. This confession was read in evidence at the trial, and there was no controversy as to the time, place and manner in which the child came to his death. It was also made to appear that the appellant and Sage were married the night after the child was drowned.

Evidence was introduced as to the physical as well as the mental condition of the appellant before, at the time of, and immediately after the alleged murder. Expert as well as non-expert witnesses testified as to her supposed mental condition during those periods of time. There was a conflict in the

evidence as between the persons composing both of these classes of witnesses. It was practically conceded that for some time before the child was drowned her health was somewhat capricious as a result of her physicial condition during that time; also, that at some times she was quite despondent, and at other times excitable and irritable, the conflict having reference mainly to the alleged unsoundness of her mind.

Annie E. Diskey was called as a witness for the State, and testified "I have been acquainted with the defendant for two years. There were two lots between my house and where she lived. I have frequently seen her prior to June 18th, 1882, washing and hoeing, and passing my house." The prosecuting attorney then asked the witness "From what you have testified to, what is your opinion as to the sanity or insanity of the defendant on the 18th day of June, 1882?" The appellant objected to the witness answering this question, upon the ground that the facts she had testified to were not sufficient to justify her in expressing any opinion as a non-expert witness upon her, the appellant's, mental condition, but the court overruled the objection and the witness answered "I think she was of sound mind."

Counsel for the appellant admit the law to be that non-expert witnesses may, in this State, express an opinion upon the mental soundness of other persons, based upon facts already sworn to by them, but argue that the facts testified to as above were too shadowy and unsubstantial to base any such an opinion upon.

The question is one concerning which no definite rule seems ever to have been formulated, but we feel justified in saying that where the witness has had an acquaintance with the person under enquiry, or has had conversations, business dealings, or social intercourse with him, he may express an opinion as to his mental condition, and the value of that opinion is a question for the jury. *Leach* v. *Prebster*, 39 Ind. 492; *Sutherland* v. *Hankins*, 56 Ind. 343; *Colee* v. *State*, 75 Ind. 511.

Applying this general proposition to the case before us, we see no error in the admission of the evidence complained of.

Other non-expert witnesses were introduced and examined by the State and permitted to express opinions as to the supposed mental soundness of the appellant under circumstances similar to those attending the testimony of Annie E. Diskey, but what we have said, in its practical application, also disposes of the several questions made upon the admission of the opinions of these witnesses.

The court instructed the jury very fully as to what was necessary to make out the crimes of murder in the first degree, murder in the second degree, and manslaughter, respectively; also, as to the nature and peculiarities of the defence of insanity in a case like this, saying to the jury, in that connection, that when established it was a complete defence, and that, if upon a full consideration of all the evidence, there remained a reasonable doubt of the appellant's sanity, they should find her not guilty. When the court concluded its instructions, counsel for the appellant asked to have three additional instructions given. The first had relation to the subject of reasonable doubts in such a case as this. The second and third to partial insanity as a mitigating circumstance merely in certain cases, both involving substantially the same principle in their application to the same class of cases.

The court gave the first instruction thus asked on behalf of the appellant, and refused to give the second and third. The second may be considered a specimen of both instructions and was as follows:

"If you find that the decedent Harry Cunningham came to his death at the hands of the defendant, at the county of Blackford, and State of Indiana, you may consider the evidence as to the state of mind of the defendant, and her physical condition, and if, when all the evidence shall be adduced before you, you find that the defendant, at the time the killing was done, was not wholly insane, though partially so, you may find her guilty of a less degree of crime than that charged

in the indictment, and find her guilty of murder in the second degree, or manslaughter."

Sections 1764 and 1765, R. S. 1881, having reference to insanity as a defence in prosecutions for crime, use the phrases "insanity" and "of unsound mind" as convertible terms, and as, consequently, meaning the same condition of the mind.

Section 1285, R. S. 1881, *supra*, declares that "The phrase 'of unsound mind' includes idiots, *non-compotes*, lunatics, and distracted persons."

The term "insanity," therefore, under the statutes of this State, includes every species of organic mental derangement, whether of a mild or violent form, and excludes every other condition of the mind. It follows that there is, in our State, no middle ground between "sanity" and "insanity," and that as regards their mental condition, in those respects, we have but two classes of people, the "sane" and the "insane." Actual insanity, however partial it may be, is, consequently, with us a defence, and not a mitigating circumstance, in a prosecution for a crime.

As we construe them, the instructions refused were less favorable to the appellant than those given by the court; at all events, the instructions not given were inconsistent with the statutory provisions of this State on the subject of insanity, and were hence correctly refused. The doctrine announced by Wharton on Criminal Law, vol. 1, section 57 a, as regards partial insanity as a mitigating element in the degrees of crime, can not be recognized as of binding authority in this State. *Willett* v. *Porter*, 42 Ind. 250; *Eggers* v. *Eggers*, 57 Ind. 461.

Independently of any question of insanity the defendant in a criminal cause has the right to have his general physical as well as his mental condition at the time of the commission of the supposed crime explained to the jury, so as to put them in possession of all the facts connected with the transaction, and the better to enable them to judge of its character; but

when insanity is relied upon as a shield against punishment, it must be specially pleaded. R. S. 1881, section 1764, *supra*.

The appellant, being a poor person, was defended at the trial by counsel assigned her by the circuit court. She now asks this court to make an allowance to her attorneys for services rendered by them upon this appeal. That request can not be granted, for reasons assigned in the case of *Stout* v. *State*, 90 Ind. 1. The judgment is affirmed, with costs.

Filed Oct. 20, 1883.

No. 8571.

## BURNS ET AL. *v.* THOMPSON.

NEW TRIAL.—*Transcript.*—A cause assigned for new trial appeared in the transcript thus: "The court erred in admitting in evidence the following executions, in these words, to wit: (These executions are inserted at full length on pages 69, 70, 75, 77. Clark W. Weesner, clerk.)" The reference in parenthesis was to a bill of exceptions made and filed long after the motion.

*Held*, that the motion presented no question to the court below.

PRINCIPAL AND AGENT.—*Statements of Agent.*—*Evidence.*—The statements of an agent while acting as such, concerning the matter in which he is acting as agent, are admissible in evidence against his principal.

EVIDENCE.—*Writing, Contradicting by Parol.*—*Fraud.*—One not a party to a written instrument, and who seeks to impeach it as being a means adopted by the opposite party to defraud him, may contradict it by parol evidence.

SUPREME COURT.—*Witness.*—That a party was not permitted to put certain questions to a witness, is not available as error in the Supreme Court, where it does not appear that the lower court was informed of the facts expected to be elicited.

From the Wabash Circuit Court.

*M. H. Kidd, N. G. Hunter* and *A. Taylor*, for appellants.

*C. Cowgill, H. B. Shiveley* and *C. E. Cowgill*, for appellee.

BLACK, C.—The appellee sued the appellants Daniel Burns, Jr., and Harvey F. Woods, sheriff of Wabash county, the complaint alleging, at length and with particularity, that two

judgments were obtained in the Wabash Circuit Court, one by the First National Bank of Wabash, for $623.32, and the other by certain persons composing the Citizens Bank of Wabash, for $244.13, both against one Moody as principal and the appellee and one Strait as co-sureties; that Moody was insolvent, and he paid nothing upon either of said judgments; that the appellant Daniel Burns, Jr., through his attorney named, had been and was wrongfully attempting to cheat and defraud the appellee in respect to said judgments in the following manner: At the time said judgments were rendered said Strait had real estate on which the judgments were liens, fully sufficient to pay his portions of the judgments, and was indebted to one Daniel Burns, Sr., who, to secure payment of his claim out of Strait's property, by the agreement and consent of Strait, from the proceeds of sales to him, said Burns, Sr., of Strait's property, satisfied to said banks for Strait his one-half of said judgments. It was agreed by and between the parties, the banks, the appellee and Strait, said attorney acting as attorney for Strait, that the appellee and Strait were ready and willing to pay their respective portions of said judgments, and should do so contemporaneously, and appellee, knowing that Strait was at the time able to pay, and relying on his representations that he would pay his portion as soon as the appellee paid his, did pay his one-half, and afterward Strait's portions of said judgments were entirely paid and satisfied as aforesaid. At the time Strait's portions were so paid, his said attorney, claiming to be representing the appellant Burns, Jr., procured assignments by said banks respectively of their said judgments to be made to Burns, Jr. When the banks were asked to so assign said judgments, they, and each of them, objected and refused, until it was stated to them and first agreed by said Burns, Jr., or by said attorney acting for him, that said judgments were entirely and forever satisfied as far as any claim that could or might ever be asserted against the appellee was concerned; and it was alleged that said banks, or either of them, never sold said judgments

to the appellant Burns, Jr., who gave no consideration for said judgments, or either of them; but said judgments were entirely paid and satisfied by said Strait out of his own property and by the appellee, to said banks, the respective owners thereof, before the pretended assignments were made to Burns, Jr.; that he, without right and wrongfully, caused executions to be issued on said judgments to the appellant Woods, as sheriff, who had levied upon and seized certain real estate owned by the appellee, and had advertised it for sale, etc. Prayer that said judgments and said writs be adjudged satisfied, and that the appellants be enjoined, etc.

The appellants answered by a general denial. The cause was tried by a jury, and a verdict was returned in favor of the appellee. A motion for a new trial, filed by the appellants, was overruled, and judgment was rendered in accordance with the prayer of the complaint. The overruling of the motion for a new trial is assigned as error.

In the motion for a new trial, the cause numbered the first contained two subdivisions, and the first subdivision appears in the transcript before us as follows:

"1. The court erred in admitting, over defendants' objections, the following, as evidence to the jury, to wit:

"*First.* The court erred in admitting the following executions issued by Citizens' Bank, in these words, to wit: (These executions are inserted at full length on pages 69, 70, 75, 77, lines 1, 1, 14, 3. Clark W. Weesner, clerk.) And the following issued by the First National Bank, in these words, to wit: (These executions are inserted at full length on pages 71, 78, 80, lines 14, 29, 18. Clark W. Weesner, clerk.) The following entries in the execution-docket, in these words, to wit: (Set out at full length on pages 83, 84, 85, 86, lines 13, 1, 1, 1. Clark W. Weesner, clerk.) Also in the testimony of Harvey F. Woods, as a witness, the following endorsement and notice of sale, in these words, to wit: (Inserted at full length on pages 88, 90, lines 6, 18. Clark W. Weesner, clerk.) Also in admitting the following præcipes,

in these words, to wit: (Inserted at full length on page 82, line 24. Clark W. Weesner, clerk)."

The references in these parentheses are to the bill of exceptions, which was not signed or filed until long after the motion for a new trial had been overruled.

The statute provides that the application for a new trial must be by motion upon written causes filed at the time of making the motion. The causes quoted above from the motion of appellants were incomplete, and, in fact, specified nothing. They presented no question to the court below, and therefore they can present no question here.

In the second subdivision of the cause, numbered the first, it was assigned that the court erred in admitting in evidence conversations of Meredith H. Kidd, with different persons, not in the presence of the defendant Burns, and the motion specified these conversations and stated the language attributed by the witnesses to Kidd.

It is urged, in objection to this evidence, that Burns, Jr., was not present at the conversations, and that it had not been shown that Kidd was the agent or attorney of the appellant Burns, or authorized to speak for him.

When this evidence was admitted there had been introduced some evidence proper for the consideration of the jury as tending to prove that Kidd was acting for the appellant Burns, as his agent, and this was further shown afterward by the testimony of the witnesses for the defendants.

The evidence of the statements of the agent, while acting as such, made in the absence of his principal, in relation to the matter in which he was acting as agent, was not inadmissible as against the principal. It is claimed in argument that this evidence contradicted the written assignments of the judgments to Burns and was inadmissible on this ground.

The plaintiff was not a party to the writings which he sought in this case to impeach.

It was alleged in the complaint, and this testimony tended to prove, that the appellant Burns, through his attorney, had

been, and was, wrongfully attempting to cheat and defraud the plaintiff in respect to said judgments, and the procurement of said assignments was alleged as a part of the means used in the attempt. Even between the parties, the terms of a written contract may be contradicted by parol, for the purpose of showing fraud, which vitiates every transaction into which it enters. *Hines* v. *Driver*, 72 Ind. 125. But aside from the question of fraud, while a dispositive instrument can not be varied by parol, so far as the parties to it are concerned, yet, in respect to strangers, written instruments, usually have no binding force, and the familiar rule against the variation of such instruments by parol evidence applies only to parties and privies, and does not forbid their being attacked and contradicted by parol by strangers to them. *McMaster* v. *President, etc., Ins. Co.*, 55 N. Y. 222, 234 (14 Am. R. 239); *People* v. *Anderson*, 44 Cal. 65; *Hubbard* v. *Harrison*, 38 Ind. 323. It was not error to permit the plaintiff to show, by parol, the real circumstances of the transaction as a part of which said assignments were made, and to thus establish the fact alleged in the complaint that, as against the plaintiff, said judgments were fully paid and discharged, one-half by each surety.

As the cause for a new trial numbered the second, it was assigned that the court erred in overruling a motion of the appellants to strike out the evidence, the objections to the introduction of which we have just considered. What we have said disposes of this cause.

As the cause numbered the third, it was assigned that the court erred in sustaining the appellee's objections to certain questions propounded by the defendants to one of their witnesses. It is sufficient to say of this that it does not appear by the record what particular facts it was expected to elicit from the witness. *Lewis* v. *Lewis*, 30 Ind. 257; *Chamness* v. *Chamness*, 53 Ind. 301; *Lowder* v. *Lowder*, 58 Ind. 538; *Graeter* v. *Williams*, 55 Ind. 461.

The fourth and fifth causes in the motion appear in the record as follows:

"4. The court erred in giving the following charge to the jury, asked for by the plaintiff, in these words, to wit: (Inserted at full length on page 145, line 1. C. W. Weesner, clerk.)

"5. The court erred in giving the following instruction to the jury, upon its own motion, to wit: (Inserted at full length, on page 147, line 24. Clark W. Weesner, clerk.)"

What we have said in disposing of the first subdivision of the first cause is applicable to the fourth and fifth causes.

The only other causes stated in the motion, being the sixth and seventh, presented the question whether the verdict was sustained by sufficient legal evidence.

We find in the record evidence tending to sustain the verdict. This being true, the testimony of a contrary tendency, if it can be said that there was such, can have no effect here to disturb the conclusion reached by the jury and sustained by the court below. We find no available error.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed April 6, 1883. Petition for a rehearing overruled October 19, 1883.

---

No. 9783.

## BROWN *v.* SUMMERS ET AL.

PROMISSORY NOTE.—*Assignor and Assignee.—Pleading.—Consideration.—Judgment.*—A complaint against the assignor of a note by mere delivery, alleging that the maker defeated a suit against him by the plea of infancy, is bad: 1. For failure to aver the consideration for the assignment; 2. Because the assignor is not bound by the judgment unless he was a party to the suit, or had proper notice thereof.

SAME.—*Endorsement.—Evidence.*—In a suit upon the endorsement of a note there was an answer that the endorsement was without consideration.

*Held*, that evidence for the defendant concerning the consideration was admissible.

From the Huntington Circuit Court.

*J. B. Kenner* and *J. I. Dille*, for appellant.
*B. F. Ibach* and *G. W. Stults*, for appellees.

HAMMOND, J.—Action by the appellant against the appellees. The complaint was in two paragraphs. The first was upon a note executed by one Householder to Flora, and endorsed by Flora to Summers, and endorsed by the latter to the appellant. The second paragraph was the same as the first, except that it was charged that Summers assigned the note to the appellant by delivery, without endorsement. It is averred in each paragraph, that in a suit on the note by the appellant against Householder, he defeated the action on a plea of infancy. Flora was not, in the present action, served with process, and did not appear. Summers' demurrer to the second paragraph of the complaint was sustained. Of this ruling the appellant complains. The ruling was right. It was not stated as a fact, in the second paragraph of the complaint, that Householder was an infant when he executed the note; nor is it averred that Summers was a party to, or had notice of, the action in which Householder was successful on the plea of infancy.

The second paragraph of the complaint was bad for another reason. It is true that one who assigns a promissory note by delivery simply, warrants by implication, unless otherwise agreed, that the face of the note is a true description of its character, in respect to its genuineness, its validity and legal operation, the competency of the maker, that the assignor is the legal holder, and that it has not been paid. 1 Dan. Neg. Ins., section 730.

In an action, however, against one who assigns a note by delivery, without endorsement, the right to recover, on the ground of the invalidity of the note, must be based upon the consideration paid for the assignment, as for money paid upon a consideration which had failed; or, if property was given for the assignment, then for the value of the property, as for property sold and delivered; or, if the assignment was for a

prior debt, then the prior debt could be sued for. *French* v. *Turner*, 15 Ind. 59. The second paragraph of the appellant's complaint was insufficient for not averring what consideration was given by the appellant to Summers for the assignment of the note.

Summers' answer to the first paragraph of the complaint was that his endorsement of the note was without consideration. The appellant moved to strike out part of this answer, but his motion was overruled, and this ruling is also assigned as error. But the overruling of a motion to strike out a part of a pleading is not an available error in this court. Ripley's Digest, p. 1300, section 28,524.

The last error complained of is the overruling of the appellant's motion for a new trial. The case having been tried by the court and a finding made for the appellee Summers, it is claimed in the motion for a new trial, that the finding was contrary to law, and that the court erred in admitting certain evidence.

We have examined the evidence and think it fairly sustains the finding. The evidence objected to was certain testimony of Summers relating to the consideration for his endorsement. The appellant claims that the endorsement could not be explained or its legal effect changed by parol evidence. Generally speaking, this proposition is correct, but the law is well settled that oral evidence is always admissible with respect to written contracts (and contracts of endorsements of notes form no exception), to show the true consideration, or the want or failure of consideration. There was no error in overruling the motion for a new trial.

Judgment affirmed, at the appellant's costs.

Filed Oct. 30, 1883.

No. 9711.

## JONES ET AL. *v.* DETCHON ET AL.

91 154
130 35

JUDGMENT. — *Lien on Decedent's Lands.— Statutes Construed.—Death, Presumption of.*—J. obtained a judgment against R., which became a lien on the lands of the latter on the 18th of March, 1868. In November, 1867, R. disappeared and was not afterwards heard of, but no administrator of his estate was appointed until November, 1879, and after that a suit was begun, under section 621, R. S. 1881, to enforce the lien of the judgment against lands of which R. was seized when the judgment was rendered.

*Held*, that the lien, as given by section 608, R. S. 1881, was lost by delay.

*Held*, also, that the death of R., presumed to have occurred in November, 1872, R. S. 1881, section 2232, did not restrain proceedings to enforce the lien until after his administrator was actually appointed in 1879, but only until an administrator might have been appointed at the instance of the judgment creditor as provided by section 2227.

From the Montgomery Circuit Court.

*G. W. Paul, J. E. Humphries* and *R. Jones*, for appellant.

*G. D. Hurley, B. Crane* and *E. C. Snyder*, for appellees.

ZOLLARS, J.—Verified complaint by appellants, as the administrators of the estate of Stephen Jones, deceased, against the widow and son of John Ray, deceased, his administrator, and purchasers of land from the son, asking that a certain judgment in favor of Jones, deceased, be declared a lien upon and enforced against the land owned by Ray at the time the judgment was rendered, and at his death.

The complaint contains a detailed statement of a litigation between Jones and Ray, in which Jones recovered a judgment in the Montgomery Circuit Court on the 18th day of March, 1868.

From the view we take of the case it will not be necessary for us to decide the disputed question between counsel, whether that judgment was *in personam* or *in rem*. If *in personam* it was a lien upon the real estate of Ray. For the purpose of this opinion, we treat the judgment as *in personam*.

Demurrers were sustained to the complaint. The errors

assigned in this court call in question the sufficiency of the complaint, and that is the only question before us for decision. This proceeding was instituted and terminated in the court below under the code of 1852. Section 527 of that code, 2 R. S. 1876, p. 233, which is the same as section 608, R. S. 1881, provided that all final judgments in the circuit courts, etc., should be a lien upon real estate, etc., for the space of ten years after the rendition thereof, and no longer, exclusive of the time during which the party might be restrained from proceeding thereon by the death, etc., of the defendant, etc.

Section 642 of that code, which is the same as section 621, R. S. 1881, provided that in case of the death of any judgment debtor, the heirs, devisees, etc., or the tenant of the real property owned by him, and affected by the judgment, and the personal representatives of the decedent might, after the expiration of one year from the time of granting letters of administration upon the estate of the decedent, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively.

It is averred in the complaint, among other things, that in November, 1867, John Ray, the judgment defendant, went to Chicago on business and has not been heard of since; that on the 25th day of December, 1867, this proceeding was commenced, a summons issued and returned as served by copy left at his last and usual place of residence; that proper affidavits were filed and property attached, and notice also given by publication; that in October, 1878, appellants were appointed administrators of the estate of Stephen Jones; that at the November term, 1879, of the Montgomery Circuit Court, one of the appellees was appointed administrator of the estate of John Ray, and that there was no personal property belonging to the estate of Ray. It will be observed that the ten years during which the judgment remained a lien upon the lands of Ray, if a personal judgment, expired on the 18th day of March, 1878, unless the judgment plaintiff was restrained from

proceeding on the judgment by the death of Ray, and by such restraint the lien was extended. *Applegate* v. *Edwards*, 45 Ind. 329; *Crans* v. *Board, etc.*, 87 Ind. 162.

The theory of the complaint seems to be that, by the absence of Ray he is presumed to have been dead since November, 1872, and that by his death the judgment creditor was restrained from proceeding on the judgment until one year after the appointment of Ray's administrator, viz., December 18th, 1880; and that hence the time from Ray's death to December 18th, 1880, should not be reckoned as a part of the ten years during which the judgment remained a lien; in other words, that that time should be added to the ten years. If that theory be the correct one, the judgment was a lien upon the lands when this proceeding was instituted, and still is.

We can not give our assent to such a construction of the sections of the statute.

For the purpose of preserving his estate and paying his debts, the law presumed the death of Ray after November, 1872, he having been absent and unheard of for five years prior thereto. 2 R. S. 1876, p. 493; R. S. 1881, sec. 2232. At that time an administrator might have been appointed to settle up his estate and pay his debts. *Baugh* v. *Boles*, 66 Ind. 376.

If it be conceded that death, thus presumed under the act of 1859, comes within the meaning of the term as used in section 527 of the code of 1852, then the judgment plaintiff was restrained from proceeding on his judgment, by the expiration of such time, as created the presumption of Ray's death, viz., November, 1872. How long was he thus restrained? Was it until one year after such time as others might procure the appointment of an administrator for the estate of Ray, be that ten years or until the expiration of twenty years from the rendition of the judgment?

The word restrained, as used in section 527, *supra*, does not mean a voluntary delay. The signification of the word is, to be hindered and prevented. It would not be a reasonable con-

struction of these statutes to say that the judgment plaintiff may voluntarily delay all efforts to enforce his judgment lien until the heirs, or others interested in the estate of the decedent, may procure the appointment of an administrator, and thus extend the lien upon the lands of the decedent. There may be no other claim against the estate. Those interested in the estate may regard such judgment as having been paid, and think there is no need of administration. Their delay for these or other causes in procuring the appointment of an administrator can not, in a legal sense, be said to restrain the judgment creditor from proceeding on his judgment. When he has power to act he is not restrained. The law provides that, after fifteen days from the death of the intestate, letters of administration may be granted, first to the widow, second to the next of kin, third to the largest creditor, and if no person thus entitled to administer shall apply within thirty days after the death of the intestate, the clerk or court shall appoint a competent inhabitant of the county to whom letters shall issue. 2 R. S. 1876, p. 492; Acts 1879, p. 121; section 2227, R. S. 1881; *Baugh* v. *Boles*, *supra*.

Clearly, the judgment creditor in this case, or his representative, had the right to be appointed administrator of Ray's estate after the presumption of his death obtained, or to have some other person appointed.

In the meaning of the law, as we think, he was restrained from proceeding on his judgment by the death of Ray no longer than such time as he might have been appointed, or have had some one else appointed, an administrator, and for one year subsequent thereto. He might voluntarily delay, of course, but that would not extend the lien of his judgment; it would be a delay without restraint.

It follows from what we have said that the demurrers to the complaint were properly sustained, because, when this proceeding was commenced, more than ten years had expired since the rendition of the judgment, exclusive of the time during

which the judgment creditor was restrained from proceeding thereon.

The complaint being insufficient for this reason, it will not be necessary for us to notice other objections urged against it.

We are not called upon to decide, and do not decide anything in relation to the right to file the judgment as a claim against Ray's estate, nor what the rule would be, if the judgment had been declared a lien upon specific property.

The judgment is affirmed, with costs.

Filed Oct. 30, 1883.

---

No. 9814.

91 158
164 354

91 158
167 134

## DILLMAN ET AL. *v.* CROOKS ET AL.

HIGHWAY.—*Public Utility.*—*Witness.*—*Opinion.*—The opinion of a witness as to the public utility of a proposed highway, is not admissible in evidence under any circumstances.

SAME.—*Practice.*—*Appeal.*—On appeal from an order of the board of county commissioners establishing a highway, a motion to set aside the proceedings of the board is unwarranted and useless.

SAME.—*Petition.*—*Uncertainty.*—*Arrest of Judgment.*—Uncertainty in a petition for a highway as to the names of owners of lands affected, is no cause for arrest of judgment on appeal in the circuit court.

From the Cass Circuit Court.

*M. Winfield*, *F. Swigart* and *Q. A. Myers*, for appellants.

*J. C. Nelson* and *D. Turpie*, for appellees.

FRANKLIN, C.—Appellees at the September term, 1879, of the board of commissioners of Cass county filed a petition for the location of a certain highway.

Appellants appeared in the case on the first day of said term, and by the agreement of parties the cause was set down for hearing on the 18th day of September, 1879, at which time the parties appeared, and appellants filed written objections to the granting of the petition, among which was that the road was not of public utility.

The objections were overruled and viewers were appointed; and on the 23d day of October, 1879, the record says, "at a regular session of the board of county commissioners of said county," the viewers filed their report in favor of the public utility of the road. At which time appellants did not appear and no objections were made to the report. The court accepted and approved the report, and ordered the road to be established of the width of thirty feet.

On the 27th day of October, 1879, appellants appeared before the auditor, filed bond and appealed the case to the circuit court. In which bond they stated their objections to the proceedings of the board.

At the September term, 1880, of the circuit court, appellants filed an answer, alleging the insufficiency of the several papers in the case and the irregularity of the proceedings therein before the board of commissioners, which answer was verified.

At the February term, 1881, of said court, appellants, William H. Dillman and Leffel, filed separate remonstrances, claiming damages. At which term there was a trial before a jury, and a verdict returned in favor of the plaintiffs, and that the road was of public utility; that Dillman would be damaged $65.00 and Leffel $60.00.

Appellants moved for a new trial, which was overruled, and judgment was rendered upon the verdict. An appeal was taken to this court and a number of specifications of error have been assigned, among which is the overruling of the motion for a new trial, which states various reasons. The third of which is: "Error of law occurring at the trial and excepted to by the defendants as follows:" Then follow a number of specifications, in which the plaintiffs, while examining their witnesses upon the trial, asked a number of them whether the road in controversy was a road of public utility, and the witnesses answered that it was. Some of the witnesses were asked to give their opinion upon the utility of the road upon the facts in their knowledge or testified to;

others were asked to state their opinions without reference to any reasons. Which questions and answers were at the time objected and excepted to by appellants.

It is insisted by appellees' counsel that these questions and answers can not be considered by this court for the reason that the bill of exceptions, embracing them, was not filed in time.

The cause was tried at the February term, 1881, and on the 19th day of March, 1881, within said February term, leave was given to file bills of exceptions within ninety days. The motion for a new trial was continued until the next term. At the next term, to wit, on May 28th, 1881, the motion for a new trial was overruled. A motion for a *venire de novo* was overruled. A motion in arrest of judgment was also overruled, and judgment rendered upon the verdict, and ninety days were then given in which to prepare and file additional bills of exceptions. Various other motions were made to modify judgment, tax costs, etc., which need not be further noticed.

The bill of exceptions No. 5, embracing the evidence above objected and excepted to, was signed by the judge and filed on the 6th day of June, 1881, within the ninety days given at the term of the trial.

The general bill of exceptions, embracing the evidence given on the trial of the cause, was signed and filed July 7th, 1881.

This was not within the time allowed at the term of the trial, but was within the time allowed at the term when the motion for a new trial was overruled; and while only the sufficiency of the evidence to sustain the verdict can be considered under the general bill of exceptions, these special questions may be considered under the special bill of exceptions No. 5.

As to the question of the admissibility of this testimony, we deem it unnecessary to enter into an extended examination and discussion of it, for the reason that this court has, very recently, in a well considered case, directly decided the

question, by unanimously holding that such testimony was not admissible, and that its admission is sufficient error to reverse the judgment. See the case of *Loshbaugh* v. *Birdsell*, 90 Ind. 466, and authorities therein cited.

There was no error in overruling the motion to set aside the proceedings before the board of commissioners. They were set aside by the appeal to the circuit court, where the issues had to be tried *de novo*. *State, ex rel.*, v. *Brewer*, 64 Ind. 131. And we think there was no error in overruling the motion in arrest of judgment. The petition was, at least, sufficient after trial. The uncertainty as to the names of the owners of the land through which the proposed road was to run, might have been remedied by a motion to make more specific, but can not be reached by a motion in arrest of judgment.

The learned counsel, in their briefs, have very ably presented a number of other questions, but, as they may not arise upon a subsequent trial, and the judgment must be reversed for the error in admitting illegal testimony, we think it unnecessary to investigate and decide these additional questions.

The judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellees' costs, and that the cause be remanded, with instruction to the court below, to sustain appellants' motion for a new trial and for further proceedings.

Filed Oct. 30, 1883.

---

| | |
|---|---|
| 91 | 161 |
| 138 | 58 |
| 91 | 161 |
| 139 | 182 |
| 139 | 472 |

No. 10,442.

## BARNES ET AL. *v.* JONES.

PARTNERSHIP.—*Receiver.*—It is only in exceptional cases that a receiver for a partnership will be appointed, unless a dissolution is about to occur or has occurred.

SAME.—*Dissolution.*—*Complaint.*—A complaint, by a partner against his copartners, for a dissolution, which shows wilful acts of fraud by the

defendants, the application by them of the partnership funds to their own uses, the making by them of false entries upon the books, the preventing of the plaintiff from having access to such books, and the wilful concealment from him of the condition of the partnership business, is sufficient for that purpose, and, upon such a state of facts, a receiver may be appointed *pendente lite*.

BILL OF EXCEPTIONS.—*Affidavits.*—*Receiver.*—Affidavits, read on the hearing of a motion for an interlocutory order appointing a receiver, become a part of the record only by bill of exceptions, or proper order of court.

Appeal from an order of the Shelby Circuit Court.

*T. B. Adams, L. T. Michener, B. F. Love, H. C. Morrison, N. B. Berryman,* —— *Wiles, D. L. Wilson* and *A. F. Wray*, for appellants.

*O. J. Glessner, E. K. Adams* and *L. J. Hackney*, for appellee.

NIBLACK, C. J.—The complaint in this case charged that the plaintiff George S. Jones and the defendants James W. Barnes and Frank Drake, on the 16th day of January, 1882, entered into a contract in writing as follows:

"SHELBYVILLE, INDIANA, January 16th, 1882.

"This agreement witnesseth that George S. Jones, J. W. Barnes and Frank Drake have this day entered into a partnership for the purpose of publishing a newspaper in Shelbyville, Shelby county, and State of Indiana, subject to the following conditions, viz.: Said Jones is to furnish all the material which he has in his office, known as the Shelby Volunteer office, at this date. Said Jones is to pay off all mortgages which may be on said Volunteer office. Said Drake and Barnes are to furnish a good printing press of sufficient size for the paper, such type as is necessary to commence the publication of said partnership paper, also to fit up office-rooms of said newspaper office in good style.

"The members of said partnership are to share equally in all expenses, profits and losses from said business. It is further agreed that said Jones is to be a silent partner, and is not to be known in the business for ten months, or such time as may be agreed upon by said parties.

"Said Drake and Barnes are to fill the subscription heretofore made by said Jones for the Volunteer. Said Jones is to reserve for himself all money due him at this time for subscription, advertising and job work, and the work connected with the Volunteer office.

"Each party is to devote his time and energy to the business in such manner as may be agreed upon by the firm.

(Signed) "FRANK DRAKE.
"J. W. BARNES.
"GEO. S. JONES."

The complaint further charged that afterwards, in said month of January, 1882, it was verbally agreed between the plaintiff and the defendants, that they should publish a six-column quarto weekly newspaper, to be known as "The Shelby Volunteer;" that all matters of business connected with said paper and its management should be submitted to all the members of the firm, and should be mutually agreed upon before any action would be taken with reference thereto; that a regular set of books should be kept in their office, in which all the business of the partnership should be promptly and accurately entered, which books should be open to the inspection of all the members of the firm; that to increase the capital stock each partner should pay in the sum of $50, which sums, together with all the moneys derived from their business, were to be deposited in the First National Bank of Shelbyville, and paid out only by checks from the firm, which was to be known by the name and style of Barnes & Drake; that as soon as the receipts from their business should exceed its expenses each member of the firm would be entitled to withdraw from the money on hand a sum equal to, and in lieu of, the $50 to be advanced by each to increase the capital stock; that the plaintiff and the defendant Barnes were to travel over and canvass Shelby and adjoining counties to obtain subscribers to and patronage for their newspaper; that Drake was to remain in the firm's office and transact all the current business connected with the publication of the newspaper; that

the business of the paper should be economically transacted; that the plaintiff had in all things complied with his part of the contract of partnership, both written and verbal, but that the defendants had neglected and refused to comply with their part of said contract in many respects:

*First.* They had failed to furnish a suitable printing press.

*Second.* The defendant Barnes had failed to travel and canvass for subscribers and patronage to the paper.

*Third.* The defendants had failed to deposit all the money of the firm which had come into their hands in bank, and had withheld a part of such moneys without the knowledge or consent of the plaintiff.

*Fourth.* The defendants had failed to enter on the books of the firm all the moneys received by them belonging to it, and had purposely and fraudulently concealed from the plaintiff the amount of money actually so received by them from time to time, as well as the sources from which much of it had been received.

*Fifth.* The defendants had falsely and improperly entered on the books of the firm the amounts of money respectively advanced by each partner to increase the capital stock of the enterprise.

*Sixth.* The defendants had paid out moneys belonging to the firm to persons to whom the firm was not indebted, and that for the purpose of cheating and defrauding the plaintiff had made false entries on the books of the firm concerning such payments.

*Seventh.* The defendants had wrongfully, and without the knowledge of the plaintiff, used the funds of the firm for their individual benefit, and had failed to charge themselves with the funds so used on the books of the firm, making several specifications of wrongful use of the partnership funds in that respect.

*Eighth.* The defendants had fraudulently appropriated divers sums of money to their own use, the amounts of which, and from whom received, being unknown to the plaintiff.

*Ninth.* The defendants had misrepresented to the plaintiff the condition of the firm, and underrated the value of the business it was doing with the view of preventing him from withdrawing the $50 he had advanced to increase its capital at the beginning as herein above stated, and had refused him an inspection of the books of the firm, keeping them either secreted or locked up so as to prevent him from having access to them.

*Tenth.* The defendants had employed more persons than were necessary for an economical management of the business of the firm, and had generally transacted its business in an extravagant and reckless manner.

Wherefore the plaintiff demanded that the partnership should be dissolved, and that a receiver might be appointed to take charge of, and close up, the business of the firm.

The complaint was verified by the oath of the plaintiff, and was filed on the 9th day of September, 1882, which was in vacation of the Shelby Circuit Court. On the same day the parties appeared before the judge of that court at chambers, in Shelbyville, and upon the facts charged in his complaint the plaintiff moved for the appointment of a receiver to take charge of the business and property of the firm. The defendants, as the record informs us, filed counter affidavits in opposition to the motion. The judge, upon full consideration of all the facts presented, ordered the appointment of a receiver in the cause, and appointed John Hoop as such receiver, who proceeded to immediately give bond and to qualify in that capacity.

This appeal is from the interlocutory order thus made in vacation by the judge of the Shelby Circuit Court, ordering and appointing a receiver in the cause.

The clerk has copied into the transcript, as a part of the proceedings before the judge at chambers, what purports to be the joint affidavit of the defendants below, and appellants here, in opposition to the appellee's motion for the appointment of a receiver, but neither this joint affidavit, nor any

other affidavit purporting to have been filed by the appellants, is copied into, or made otherwise a part of, the bill of exceptions we find in the record. A blank space was left in the bill of exceptions for counter affidavits said to have been filed, but that space remains unfilled, and without any reference to any other part of the record. The affidavit copied into the transcript, having been improperly brought into the proceedings below by the clerk, as if it had been a pleading in the cause, can not be treated by us as a part of the record, and if a reference had been made to it, as found in the transcript, by the clerk in certifying the bill of exceptions, that would not have made it a part of the bill of exceptions. *Stewart* v. *Rankin*, 39 Ind. 161; *Sidener* v. *Davis*, 69 Ind. 336; *Douglass* v. *State*, 72 Ind. 385; *Colee* v. *State*, 75 Ind. 511; *Chambers* v. *Butcher*, 82 Ind. 508; *Sanders* v. *Farrell*, 83 Ind. 28.

There are, consequently, no counter affidavits lawfully before us, and for that reason the cause will have to be decided here upon the allegations of the complaint.

In this condition of the record we are not judicially informed that the facts relied upon in argument by counsel for the appellants, as being a complete answer to the charges made by the complaint, were before the judge at the hearing, and the argument is, in consequence, so far as it rests upon certain alleged facts, unsupported in many material respects by the record.

Independently of any statute upon the subject, there may be cases in which a receiver should be appointed to take charge of the business of a firm merely to bridge over an emergency without a dissolution of the partnership, but the general rule is, as insisted by counsel for the appellants, that a receiver for the business of a firm will not be appointed unless a dissolution has taken, or is about to take, place. Collyer Partnership, section 353; *Dale* v. *Kent*, 58 Ind. 584.

As to causes for the dissolution of a partnership, Collyer, *supra*, after making some quotations from distinguished jurists, proceeds, at section 281: "However, it may with safety be

laid down, that not only wilful acts of fraud and bad faith, but gross instances of carelessness and waste in the administration of the partnership, as well as exclusion of the other partners from their just share of the management, so as to prevent the business from being conducted on the stipulated terms, are sufficient grounds for the dissolution of the contract by a court of equity. So also, it seems clear that a habit on the part of one partner of receiving moneys and not entering the receipts in the books, or not leaving the books open to the inspection of the other partners, whether such conduct arise from a fraudulent intent or not, is good ground for a dissolution." *Howell* v. *Harvey*, 5 Ark. 270.

This quotation affords a fair illustration of the different kinds of misconduct on the part of the partners, which have been recognized by text-writers and many decided cases as constituting good grounds for the dissolution of a partnership.

The facts charged in the complaint made a very strong *prima facie* case, both for the dissolution of the partnership and the appointment of a receiver to close up its business. There was, consequently, no error in granting the interlocutory order appointing a receiver.

The judgment is affirmed, with costs.

Filed Oct. 30, 1883.

---

No. 10,098.

## MITCHELL *v.* TOMLINSON.

91 167
156 72

91 167
165 88
165 232

PROMISSORY NOTE.—*Endorser and Endorsee.—Law Merchant.—Fraud.—Negligence.—Answer.—Consideration.*—To a suit by the endorsee, against the maker, of a note payable at a bank in this State, an answer showing by proper averments that the note was without consideration, and the execution thereof obtained by fraud while the defendant was so under the influence of medicines administered by the person who received the note that he was incapable of comprehending the nature of the transaction, is good on demurrer. So, also, an answer that the note was without consideration and was obtained by fraud, properly alleged, and that the plaintiff and prior endorsees had notice thereof before taking the note.

Mitchell *v.* Tomlinson.

SAME.—*Note Procured by Fraud.—Bona Fide Purchaser.*—Where a promissory note governed by the law merchant is procured by fraud, and without consideration, of one who without negligence signs it under the belief that he is executing a contract of agency, the maker is not liable even to a purchaser in good faith.

SAME.—*Burden of Proof.*— Where, in a suit by the endorsee against the maker of a note payable at a bank in this State, the defendant shows that the note was procured by fraud, the burden is on the plaintiff to show that he is a *bona fide* holder, for value, by endorsement before maturity, in the regular course of business.

SAME.—*Party.— Witness.—Cross-Examination.*—Where a plaintiff submits himself as a witness to prove that he took innocently commercial paper shown to have been procured by fraud and without consideration, considerable latitude should be allowed in his cross-examination.

SUPREME COURT.—*Instructions.— Verdict.*—Where all the instructions given to the jury do not appear, there can be no reversal merely because it appears that the court instructed the jury to consider all the facts and render such a verdict as they should deem just and right.

From the Henry Circuit Court.

*T. B. Redding*, for appellant.

*J. H. Mellett* and *E. H. Bundy*, for appellee.

HAMMOND, J.—Complaint by appellant against appellee upon a promissory note for $250, executed by the appellee July 30th, 1880, payable four months after date to his own order, at the First National Bank of Indianapolis, Indiana, with attorney fees, and waiving benefits of appraisement laws. The complaint alleges that the note was endorsed by the appellee to B. D. Pritchard, and endorsed by Pritchard to the appellant before its maturity. Copies of the note and endorsements were filed with the complaint.

The appellee answered in two paragraphs, to each of which a demurrer, alleging want of facts, etc., was overruled. The appellant replied by the general denial, and by a special paragraph, alleging that the note was endorsed and transferred to the appellant before its maturity for a valuable consideration, without any knowledge or information upon his part of any defence thereto. There was a trial by jury, resulting in a verdict for the appellee, and over the appellant's motion for a new trial, judgment was rendered on the verdict. Ques-

tions, as to the correctness of the rulings on the demurrer to each paragraph of the answer, and on the motion for a new trial, are properly presented by the record.

It is alleged, substantially, in each paragraph of the answer, that the appellee, at the time of the execution of the note, was seventy years of age, and had been an invalid for thirty years; that he could not read writing, or ordinary print, without the use of glasses, and then with great difficulty; that the day preceding the date of the note, two strangers came to appellee's house, on his farm in the country, one of whom gave his name as G. P. Porter, representing that he was an agent of the Western Medical Works, of Indianapolis, Indiana, and asked and obtained permission of appellee to remain over night with him; that on the following morning an arrangement was made by which Porter appointed the appellee as agent of said Western Medical Works, and procured him to sign, in duplicate, what was read to him by Porter, as a contract of such agency, and which was signed by the appellee under the belief that he was signing such contract; that if his signature is attached to the note and endorsement in suit, it was procured as aforesaid; that no note was spoken of, and that he had no intention of signing a note, and that the note sued upon is without any consideration. The second paragraph of the answer contains the averment which is omitted in the first, that Pritchard, when he received the note, and the appellant, when the note was endorsed to him, each had notice of the fraud in its procurement. The first paragraph of the answer contains averments which are not in the second, to the effect that, during the evening after the strangers came to appellee's house, "Porter observing the great suffering which he (the appellee) was then enduring, administered to him a kind of potion or medicine * * * which benumbed his sensibilities and caused him to sleep until late next morning;" that upon arising from his bed the next morning, he "was affected with strange and unusual feelings and sensations, giddiness in the head

and loss of the usual faculties of his mind; that he complained of his unusual feelings, whereupon Porter induced him to take other medicines, which he then administered to him, by which his usual faculties of mind were greatly impaired, to an extent that what was subsequently done seems but an impression upon his mind, of which he has no recollection;" that it was while he was in this condition, and without knowing or comprehending what he was doing, by reason of said condition, that the note and endorsement sued upon were signed, under the belief that he was signing a contract of agency.

The second paragraph of the answer is certainly good, as it avers that both Pritchard and the appellant, at the time of the respective endorsements to them, had notice of the fraudulent means whereby the execution of the note had been procured.

We think, also, that the first paragraph of the answer was sufficient. Even though it fails to aver facts showing that when the note was executed, the appellee's mental condition wholly incapacitated him from making any binding contract, it does show, in connection with other facts, that his mental condition was such as to relieve him from the charge of negligence in executing the note. *Webb* v. *Corbin*, 78 Ind. 403; *Baldwin* v. *Bricker*, 86 Ind. 221. We think, under the facts stated in the first paragraph of the appellee's answer, that he acted with the degree of care required by the law, namely, with the prudence of ordinary men similarly situated.

The court did not err in overruling the appellant's demurrer to either paragraph of the answer.

We will now consider the appellant's motion for a new trial. The first and second causes assigned for a new trial relate to the ruling of the court in refusing to suppress certain questions and the answers thereto in the cross-examination of the appellant in his deposition. The deposition had been taken at the instance of the appellant, but was introduced in evidence by the appellee. The questions and answers objected to tended to prove that at the time the note was endorsed to him, the appellant had notice of its fraudulent procurement.

Although some of the questions and answers were not entirely pertinent, we think there was no substantial error in refusing to strike them out. Where the holder, by endorsement, of commercial paper, which is shown to have been procured by fraud and without consideration, introduces himself as a witness to prove that he is an innocent party in the transaction, considerable latitude is allowable in his cross-examination.

Causes from three to ten, inclusive, in the appellant's motion for a new trial, are not discussed by his counsel, and are therefore regarded as waived.

The eleventh cause for a new trial was that the court erred in giving to the jury instructions from one to six, inclusive. No objection, however, is urged, in the appellant's brief, to any of these charges, except the fourth and fifth. The court, in its fourth charge, advised the jury of the issues made by the first and second paragraphs of the appellee's answer, stating that the facts set up in both paragraphs were substantially alike, and informed the jury, in substance, that if they found from the evidence, that the note was procured by fraud as alleged in the answers, that the appellee was not asked to sign a note and did not intend to sign a note, and that, if the jury found from the evidence that the appellee was not guilty of any negligence in signing the note, then he would no more be bound by the note than if it were a total forgery; and that, in such case, it would make no difference whether the appellant procured the note in good faith or in bad faith. In the previous charge the court had informed the jury that if the appellee was guilty of negligence in ascertaining the character of the instrument, or in placing his name to it, and the note came into the hands of the appellant in good faith and for a valuable consideration, without notice of any previous fraud, then the appellant would be entitled to recover.

Taking these instructions together, we think that they fairly expressed the law.

The fifth instruction given by the court, and to which objection is made by the appellant, was as follows:

"5. You will look over and carefully consider all the facts of the case, and render such a verdict as you deem just and right in this case."

The record does not purport to contain all the instructions, and this being the case we must presume that the court properly charged the jury as to the burden of proof and the weight of evidence, and informed them that they must take the law as given by the court. For all that appears in the record before us, the court may have informed the jury that a verdict to be "deemed just and right" must be in conformity with law and the preponderance of evidence. We are to presume in favor of the correctness of the rulings and charges of the trial court, unless the error affirmatively appears from the record.

The twelfth cause for a new trial was that the court erred in refusing to give each of the five instructions tendered by the appellant. We have examined these instructions and think there was no error in refusing them, for the reason, if for no other, that each of them assumed that, in case the note sued on was found to have been procured by fraud, the burden was upon the appellee to prove that the appellant was not an innocent holder of the note. This is not the law. In an action by an endorsee of a note payable in a bank in this State, and proved by the maker to have been obtained by fraud, the burden of proof is upon the plaintiff to show that he is a *bona fide* holder by endorsement, for value, before its maturity and in the regular course of his business. *Harbison* v. *Bank of the State of Indiana*, 28 Ind. 133; *Zook* v. *Simonson*, 72 Ind. 83; *Baldwin* v. *Fagan*, 83 Ind. 447.

The remaining causes for a new trial, the thirteenth and fourteenth, were on account of the verdict not being sustained by sufficient evidence, and being contrary to law.

While there was some conflict in the evidence, we think it fairly sustains the verdict, and that it was not contrary to law.

Judgment affirmed, at the appellant's costs.

Filed Oct. 31, 1883.

No. 10,035.

## DEWEY ET AL. *v.* THE STATE, EX REL. MCCOLLUM, ET AL.

HIGHWAY.—*Free Turnpike Roads.—Act of March 3d, 1877.—County Board.—Engineer.—Error in Contract.—Complaining Party.*—Under section 5095, R. S. 1881, after an order is made for the construction or improvement of a free turnpike or gravel road, or for any change in the same, it is the duty of the county board to appoint a competent engineer to superintend the work, who shall, with the approval of the county commissioners, make a contract for the performance of the work; but, under section 5102, R. S. 1881, no person is permitted to take advantage of any error committed by the county commissioners, or by the engineer or surveyor, or of any informality, error or defect appearing in the record of such proceedings, unless it is shown that the complaining party is injuriously affected thereby.

SAME.—*Pleading.—Demurrer.—Incapacity to Sue.—Defect of Parties.*—A demurrer to a complaint, assigning as cause that the plaintiff has not legal capacity to sue, has reference only to some legal disability of the plaintiff, such as infancy, idiocy or coverture; and where a defect of parties is the cause assigned, the demurrer must specifically point out and name those who should have been, but were not, made parties.

SAME.—*Duty of County Board.—Contract for Work.—Contractor's Bond.*—Under section 4246, R. S. 1881, it is the duty of the county board to let no contract for any county building or work until the contractor has first given a good and sufficient bond, payable to the State of Indiana, signed by at least two freehold sureties, guaranteeing the accomplishment of two purposes, namely: 1. The faithful performance and execution of the work; and, 2. The prompt payment by the contractor of all debts incurred by him in the prosecution of the work, including labor, materials furnished, and for boarding the laborers thereon. As to the second of these purposes, for any breach thereof by the contractor, the right of action is in the laborer, the material-man, or the person boarding the laborers, and can not be defeated by any act done, or omitted to be done, by the county board.

PRACTICE.—*Amending Complaint After Issue Joined.—Affidavit of Prejudice.—Discretion of Court.*—It is within the discretion of the trial court to allow the plaintiff to amend his complaint, after the cause is at issue and set for trial; and, unless the contrary is shown by affidavit or other proof, it will be presumed by the Supreme Court that the defendant was not prejudiced by the amendment.

From the Marion Circuit Court.

*O. T. Boaz, N. B. Taylor, F. Rand* and *E. Taylor*, for appellant.

*D. V. Burns* and *C. S. Denny*, for appellees.

HOWK, J.—The first error complained of in this court by the appellants is the overruling of their demurrer to the complaint of the appellee's relator, Thomas J. McCollum. In his complaint the relator, complaining of Austin C. Dewey, James E. Twiname, J. Kearney Graham, Arthur Mueller and William Baird, the appellants, and Samuel Pfendler, Isaac Golden, George Thomeyer, Robert Means, Martin V. Springer, Susan Pauley, Margaret J. Rock, James J. McCollum, George Stephens, George W. Crossen and Henry Jenkins, who are named appellees in the assignment of errors, as defendants, alleged, in substance, that, on October 7th, 1879, the appellants Dewey, Twiname and Graham entered into a contract in writing with the board of commissioners of Marion county, of the tenor following, to wit:

"Articles of agreement made and entered into this 7th day of October, 1879, by and between the commissioners of Marion county, Indiana, of the first part, and Austin C. Dewey, James E. Twiname and J. Kearney Graham, all of Marion county, Indiana, of the second part, witnesseth: That, for and in consideration of the payments and covenants, hereinafter mentioned, to be made and performed by said commissioners, the said party of the second part hereby promise and agree to grade and gravel a road, known by the name of the *William A. Anderson et al.*, or *Acton*, free gravel road, in Franklin township, Marion county, Indiana, according to the directions of the engineer in charge of the work, the said work to be finished and ready for travel over the road on or before January 1st, 1880. No charge shall be made by the party of the second part for any hindrance or delay, or loss on account of bad weather, or from other causes, during the progress of the work, but [it] may entitle them to such extension of time allowed for the completion of the work so

delayed, and said time to be determined by the engineer. The said party of the second part shall not transfer this contract, or any part thereof, without the consent in writing of the commissioners. In consideration of the fulfilment, by said party of the second part, of the foregoing provisions of this contract, the commissioners of Marion county hereby promise and agree that they will issue to said party of the second part, or cause the same to be issued, gravel road seven per cent. bonds of Marion county, said bonds to call for the payment of all work at the following prices, to wit: For gravelling fifteen cents per cubic yard; for gravel fifty cents per cubic yard; and for timber for culverts twenty-five dollars per one thousand feet, board measure. Partial payments may be asked for and received on estimates made by the engineer; such payments, however, shall be but ninety per centum of the full value of the work performed, and when it shall be paid for in full, together with any sums reserved from previous estimates. As witness our hands and seals."

(Signed by each of the county commissioners and each of the party of the second part.)

The relator further alleged that the board of commissioners demanded and required of the appellants Dewey, Twiname and Graham, as a pre-requisite to entering into the foregoing contract with them, that they should file a bond with approved security, conditioned, among other things, that they would pay all claims for materials furnished and labor performed in the construction of the road in such contract mentioned; that in pursuance of such requirement, and in consideration that such contract be let to them, Dewey, Twiname and Graham, they prepared, signed and filed, in conjunction with their co-appellants, Mueller and Baird, as their sureties, with the board of commissioners, their bond, of the tenor following, to wit:

"Know all men by these presents, that we, Austin C. Dewey, James E. Twiname and J. Kearney Graham, as principals, and Arthur Mueller and William Baird, as sureties, all of Marion county, State of Indiana, are firmly bound unto the

State of Indiana in the penal sum of three thousand dollars, for the payment of which well and truly to be made, we bind ourselves firmly by these presents, this 6th day of October, 1879.

"The condition of the above obligation is such that whereas the board of commissioners of Marion county, State of Indiana, are about to let a contract for the grading and gravelling of the *William A. Anderson et al.* free gravel road, in Franklin township, in said county; and whereas the above named Dewey, Twiname and Graham have filed a proposal for said work with the surveyor of the said Marion county:

"Now, therefore, if the said board of commissioners shall award the said Dewey, Twiname and Graham the contract for said work, and the said Dewey, Twiname and Graham shall promptly enter into contract with the said board of commissioners for said work, and shall well and faithfully perform the same in all respects according to plans and specifications adopted and on file with this bond, and according to the time, terms and conditions specified in said contract to be entered into, and shall promptly pay all debts incurred by them, in the prosecution of said work, including labor, materials furnished and boarding the laborers thereon, then this obligation shall be void, otherwise to remain in full force, virtue and effect."

(Signed and sealed by each of the obligors named in such bond.)

The relator further said, that after the execution of such bond and contract, the appellants Dewey, Twiname and Graham, as such contractors, employed defendant James J. McCollum to haul gravel and place the same on said road, agreeing to pay him for his work and labor what the same might be reasonably worth; and that, in pursuance of such employment, the said James J. McCollum hauled and placed on said road 1682 yards of gravel, which was reasonably worth ten cents per yard, etc. The complaint then states in detail that the appellants Dewey, Twiname and Graham, in the performance of their said contract, became indebted to each of

the defendants whose names appear as appellees in the assignment of errors, in certain named sums, either for work done or for materials furnished, by them respectively, for said contractors, in the construction of such free gravel road; and it was alleged, that before the bringing of this suit each of the defendants (named appellees) had assigned, for value, his or her account for such work or materials to the State's relator, and each of them was made a defendant to answer as to such assignment; that the relator and the defendants (named appellees) had notified the appellants Mueller and Baird, the sureties in such bond, that they accepted the provisions thereof in their favor, and demanded payment of the several sums of money theretofore mentioned; and that the said sums of money remained due and wholly unpaid. Wherefore, etc.

Appellants' counsel earnestly insist that the board of commissioners of Marion county were not authorized, by the statutes in force at the time, to enter into the contract with the appellants Dewey, Twiname and Graham, mentioned in the relator's complaint; and that such contract being *ultra vires* and void, the bond in suit by the relator, in this cause, is necessarily void. On the other hand, the relator's counsel contend that the county board had full power and authority, under the statutes then in force, to enter into the contract mentioned; but that, even if such contract were *ultra vires* and void, the appellants and each of them were estopped, by the recitals in the bond in suit, to call in question or deny the validity of such contract.

It is manifest, we think, that the contract set out in the relator's complaint was made, or intended to be made, by and between the board of commissioners of Marion county and the appellants Dewey, Twiname and Graham, under, pursuant to and in conformity with the provisions of "An act authorizing boards of county commissioners to construct gravel, macadamized, or paved roads, upon petition," etc., ap-

proved March 3d, 1877. In section 1 of this act (sec. 5091, R. S. 1881), it is provided as follows:

"The board of commissioners of any county in this State shall have power, as hereinafter provided, to lay out, construct, or improve, by straightening, grading, draining (in any direction required to reach the most convenient and sufficient outlet), paving, gravelling, or macadamizing any State or county road, or any part of such road, within the limits of their respective counties."

Under this statute, there can be no doubt, we think, of the jurisdiction of the county board over the subject-matter of the contract with the appellants Dewey, Twiname and Graham, for the grading and gravelling of the *William A. Anderson et al.*, or *Acton*, free gravel road, within the limits of Marion county. The county board was clothed by the statute with original jurisdiction, and required to exercise powers and duties, judicial in their nature, over and in relation to the construction of such free gravel road. *Million* v. *Board, etc.*, 89 Ind. 5. The proceedings of the county board, which led to the execution of the contract, set out in the complaint, are not before us; but it may well be assumed, the contrary not appearing, that these proceedings were regular and in conformity with the statute, and that the proposed work was properly and legally let to the appellants Dewey, Twiname and Graham, as the lowest and best bidders therefor.

In section 5 of the aforesaid act of March 3d, 1877, (section 5095, R. S. 1881) among others, are the following provisions: "After making such order for an improvement, or for any change of the same, the commissioners shall appoint a competent engineer to superintend the performance and completion of said work, who shall, with the approval of the county commissioners, make a contract for the performance of the work; and the contractor may at once enter upon the performance of said work, under the superintendence of the engineer appointed as aforesaid: *Provided*, That said improvement shall be let in sections of not less than one-half mile,

and to the lowest and best bidder who shall give such reasonable security for the proper performance of his contract within the time and manner described, as the county commissioners may deem expedient; *Provided, further*, That notice of such letting shall be given by publication in a newspaper in the county for two weeks next prior to such letting, and all bids shall be sealed when filed; but no bid shall be accepted which exceeds the estimated cost, and the engineer and commissioners shall have the right to reject any or all bids."

It is insisted that the contract, set out in the relator's complaint, was not executed in conformity with the foregoing provisions of the statute, and is therefore void. It will be observed, that when the order for an improvement is made, the statute provides that "the commissioners shall appoint a competent engineer to superintend the performance and completion of said work, who shall, with the approval of the county commissioners, make a contract for the performance of the work." If, by this provision of the statute, it was intended that the engineer appointed should, in his own name, make and execute the contract for the performance of the work, it is clear that the contract, copied in the complaint, does not conform to such intention. It can not be said, however, that this contract was not made "with the approval of the county commissioners;" for it was executed by the commissioners and each of them, and they would hardly have subscribed their names thereto, if it had not met with their full approval. It seems to us that the legality and validity of such a contract are much more dependent, under the statute, upon "the approval of the county commissioners," than upon the signature of the "competent engineer," appointed by them "to superintend the performance and completion of the work." Besides, in section 12 of the aforesaid act of March 3d, 1877 (sec. 5102, R. S. 1881), it is expressly provided, as follows:

"No person shall be permitted to take advantage of any error committed in any proceeding to lay out, construct, or improve any road under and by virtue of this act; nor of any

error committed by the county commissioners or by the county auditor, or by the engineer or surveyor or other person or persons in the proceedings to lay out, construct, or improve any such road; nor of any informality, error, or defect appearing in the record of such proceedings, unless the party complaining is affected thereby."

Under this curative provision of the statute, we are of the opinion that the contract, a copy of which was set out in the relator's complaint, was not vitiated, avoided, nor, in anywise, invalidated by any informality or error, either of the county commissioners or of the engineer or surveyor, in the execution of such contract. In construing this statutory provision, in *Million* v. *Board, etc., supra*, this court said: "Under this provision of the statute it is not enough for the complaining party to show that he is affected by the proceeding to lay out, construct or improve any road, but he must clearly show, we think, that he is injuriously affected, and in what respect, by the informality, error or defect, of which he complains, in any such proceeding, and that the same can not be corrected by the county board, before he can be permitted to take advantage thereof by an action in the circuit court."

In the case in hand, it would seem that the contract, whereof a copy is given in the relator's complaint, was informally or erroneously made by and in the name of the county commissioners, instead of having been made by and in the name of the engineer, appointed to superintend the work, "with the approval of the county commissioners." We are unable to see that this informality or error, if such it be, in the execution of such contract, injuriously affected in any respect, or to any extent, the appellants, or either of them. Under the statutory provision last quoted, therefore, it seems clear to us that the appellants can not, nor can either of them, be permitted to take advantage of the informality, error or defect, conceding it to be such, in the execution of the contract, whereof a copy is set out in the relator's complaint. For the reasons given we are bound to conclude, as we do, that the re-

lator's complaint, in so far as its sufficiency was dependent upon the legality or validity of the contract set out therein, stated facts sufficient to withstand the separate demurrers of the appellants Mueller and Baird thereto, for the alleged want of facts therein.

What we have said, in relation to the contract set out in the relator's complaint, practically disposes of all questions in regard to the legality and validity of the bond of the appellants, a copy of which was given in the relator's complaint. From the stipulations in this bond it is manifest that it was required by the county commissioners, and was executed by the appellants, in intended conformity to and compliance with the provisions of section 4246, R. S. 1881, in force since July 2d, 1877. In this section it is provided, in substance, that no bid for any county building or work "shall be received or entertained by the board of commissioners of any county in this State, unless such bid shall be accompanied by a good and sufficient bond, payable to the State of Indiana, signed by at least two resident freehold sureties; which bond shall guarantee the faithful performance and execution of the work so bid for, in case the same is awarded to said bidder, and that the contractor, so receiving said contract, shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished, and for boarding the laborers thereon." Having reached the conclusion that the contract, of which a copy is given in the relator's complaint, can not be objected to by the appellants, or either of them, on the ground of the informality, error or defect in its execution, it must be held also, we think, that the bond in suit was authorized by the statute, and that, as against each and all of the appellants, it was a legal, valid and binding obligation, under the provisions of section 4247, R. S. 1881, in favor of any laborer, material-man, or person furnishing board to the contractors, under such contract, or of his, her or their assignee.

The demurrers of the appellants Mueller and Baird to the relator's complaint, upon the ground that it did not state facts

sufficient to constitute a cause of action, in our opinion, were correctly overruled.

Appellants Mueller and Baird also assigned as causes for demurrer to the complaint, that the appellee's relator had no legal capacity to sue, and, again, that there was "a defect of parties, plaintiff or defendant." It is settled by the decisions of this court, that the second statutory cause of demurrer, namely, "that the plaintiff has not legal capacity to sue," has reference only to some legal disability of the plaintiff, such as infancy, idiocy or coverture, and not to the fact, if it be the fact, that the complaint fails to show, upon its face, a right of action in the plaintiff. *Debolt* v. *Carter*, 31 Ind. 355; *Dale* v. *Thomas*, 67 Ind. 570. In this case, the complaint does not show that the relator was under any legal disability, and, therefore, the demurrers, assigning for cause, that the plaintiff had not legal capacity to sue, were properly overruled.

A demurrer to a complaint, upon the ground of a defect of parties, "must specifically point out and name those who should have been, but were not, made parties." Busk. Prac. p. 168. *Durham* v. *Bischof*, 47 Ind. 211; *Cox* v. *Bird*, 65 Ind. 277; *Newcome* v. *Wiggins*, 78 Ind. 306, 315. The demurrers, in the case at bar, upon the ground of a defect of parties, neither point out nor name the persons "who should have been, but were not, made parties." The question of the defect of parties, plaintiff or defendant, therefore, was not presented below, nor is it presented here for decision.

The court committed no error, we think, in overruling the demurrers to the relator's complaint.

The appellants Dewey, Twiname and Graham, jointly answered by a general denial of the complaint. Appellant Baird seems to have separately answered the complaint, but his answer is not in the record. The defendants below, who are named as appellees in the assignment of errors, jointly answered, admitting the allegations of the complaint to be true. Appellant Mueller separately answered in three paragraphs, of which the first was a general denial and each of

the other two paragraphs stated special matter by way of defence. The relator's demurrers, for the want of facts, were sustained by the court to the affirmative paragraphs of Mueller's answer, and these rulings are assigned here, as errors, by the appellants.

In the second paragraph of his answer, the appellant Mueller said it was true, that the commissioners of Marion county entered into a contract with Dewey, Twiname and Graham for the construction of a gravel road, as set out in the complaint, and that he, Mueller, executed the bond copied in the complaint; but he averred that the county commissioners did not observe the conditions of such contract, in this, that such contract provided, among other things, that "partial payments may be asked for and received on estimates made by the engineer, such payments, however, shall be but ninety per centum of the full value of the work performed;" that the board of commissioners, wholly unmindful of their obligation to the appellant Mueller, paid the contractors Dewey, Twiname and Graham, on October, 20th, 1880, the work not having been then fully completed, the sum of $325, which sum was not paid upon any estimate of work done or materials furnished, made by any engineer in charge of the work, but was in fact a part of the ten per centum theretofore deducted and retained by the commissioners from work done, and estimates of work done and performed by the engineer in charge of the work; that appellant Mueller relied upon the promises of the board of commissioners, that it would observe such parts of the contract as were incumbent upon it to observe, and particularly upon its promise to retain the ten per cent. as aforesaid, as his security against any loss to him, by reason of his suretyship on the bond in suit; that the failure of the board of commissioners to observe such clause in the contract greatly increased his, Mueller's, risk of loss; and that he, Mueller, never consented that his liability might be so increased, and his security lessened by reason of such failure on the part of the commissioners to observe the

conditions of such bond; wherefore the appellant Mueller said that he was, and ought to be, released from his obligation upon the bond in suit and to appellee's relator.

In the third paragraph of his answer the appellant Mueller, admitting the contract by and between the county board and Dewey, Twiname and Graham, and his execution of the bond in suit, as set out in the complaint, alleged, in substance, that at the time he executed such bond, he was informed by the contractors, when they offered to contract for the road at the prices stipulated, that gravel could be procured from the adjacent territory at a cost which would amply compensate the contractors, and that it was not necessary to haul gravel any great distance, to wit, not to exceed one mile, and that such information was true; but the appellant Mueller averred that, after the work had progressed, it was found that gravel could not be easily procured without condemning a certain pit belonging to one Golden, who refused to allow the contractors to use his gravel; that Golden was a friend of, and exercised great influence over, one of the county commissioners; that Golden and such commissioner procured the county board to enter into an agreement, by which the contractors were to leave undisturbed the gravel belonging to Golden, and were to haul gravel from the pit of one Means, in Shelby county, at an increased expense of thirty-one cents per load, which increased expense the county board agreed to pay, and that an order to that effect was passed by the county board, in regular session; that, according to this arrangement, the contractors procured of Means 481 loads of gravel, and incurred therefor the extra expense of thirty-one cents per load; and appellant Mueller averred that this whole arrangement and modification of the contract were made without his knowledge and consent, and that such modification of the contract largely increased his liability upon such bond. Wherefore appellant Mueller said that he was, and ought to be, released from his obligation upon the bond in suit, etc.

We are of the opinion that the court committed no error

in sustaining the relator's demurrers to these paragraphs of Mueller's answer, for neither of these paragraphs, as we think, stated facts sufficient to constitute any defence to the relator's cause of action as set forth in his complaint. The bond in suit, as we have seen, is purely a statutory bond. The statute required the bond to be executed, and it was executed, to secure the accomplishment of two purposes, namely: 1. The faithful performance and execution of the work by the contractors; and, 2. The prompt payment by the contractors of all debts incurred by them in the prosecution of the work, "including labor, materials furnished, and for boarding the laborers thereon." Section 4246. With the accomplishment of the second of the purposes, after the taking of such bond, the board of commissioners had nothing whatever to do. If the contractors failed to promptly pay any such debts, incurred by them in the prosecution of the work, the right of action therefor against them and their bondsmen, under the statute, was in the laborer, the material-man, or the person furnishing board to such contractors. Section 4247. This right of action can not be defeated, we think, by any act done, or omitted to be done, by the board of commissioners of the county. It follows, therefore, that the second and third paragraphs of Mueller's answer were each insufficient to constitute a bar to the relator's cause of action, and that the demurrers thereto were correctly sustained.

It is earnestly insisted by the appellant's counsel that the trial court erred in permitting the relator, after the cause was put at issue, to amend his complaint. As originally filed the complaint was in the name of Thomas J. McCollum, plaintiff, and as amended it was in the name of "The State of Indiana, on the relation of Thomas J. McCollum," plaintiff. This was the only amendment, and it appears to have been made sixteen days before the cause was called for trial. Under section 391, R. S. 1881, it was within the discretion of the trial court to allow such an amendment to be made; and the appellants failed to show that they, or either of them, were

prejudiced by the amendment. *Durham* v. *Fechheimer*, 67 Ind. 35; *Child* v. *Swain*, 69 Ind. 230; *Town of Martinsville* v. *Shirley*, 84 Ind. 546.

Most of the causes for a new trial, assigned in the appellant's motion therefor, were founded upon the supposed error of the court in allowing the relator to amend his complaint as aforesaid; and, as we have reached the conclusion that the court did not err in allowing such amendment, it is manifest that these causes for a new trial had no sufficient foundation. The finding of the court was sustained by sufficient evidence and in accordance with law, and the court did not err, we think, in overruling the motion for a new trial.

We find no error in the record of this cause which authorizes or requires us to reverse the judgment below.

The judgment is affirmed, with costs.

Filed Oct. 30, 1883.

No. 10,679.

## SIDENER ET AL. *v.* THE HAW CREEK TURNPIKE COMPANY.

GRAVEL ROAD.—*Tolls.*— *Injunction.*—*Complaint.*—A complaint to enjoin a turnpike company from collecting tolls showed that the pike was six miles long, all of which was in good condition and finished, except two miles which were not finished so as to authorize the collection of tolls thereon, and it was not averred that tolls were exacted upon the two miles, or that the plaintiffs were hindered from passing over the same unless tolls were paid, but merely that tolls were demanded and had been paid therefor by the plaintiffs; nor was it averred that the plaintiffs had in the use of that part of the road any interest beyond that of the general public.

*Held*, that the complaint was bad on demurrer.

SAME.—Injunction will not lie to prevent the wrongful collection of tolls by a turnpike company which merely demands the tolls without hindering the passage of those who do not pay.

From the Johnson Circuit Court.

*A. Burns*, for appellants.

*G. M. Overstreet* and *A. B. Hunter*, for appellee.

Sidener *et al.* *v.* The Haw Creek Turnpike Company.

FRANKLIN, C.—Appellants commenced a suit against appellee in the Bartholomew Circuit Court, in 1877, for an injunction against the collection of tolls on its turnpike road. The road is six miles long, extending from the county line between the counties of Decatur and Bartholomew in a southwest direction to the town of Hope, in Bartholomew county. A corporation was organized to construct the road in 1863. It became embarrassed, and upon the foreclosure of a mortgage the road was sold and purchased by other parties in 1875, who reorganized the corporation under the name of the appellee.

The complaint is too lengthy to copy in an opinion. It substantially charges that the road was never finished; that it was out of repair, and had remained so for an unreasonable time; that it was located upon a public highway of more than twenty years standing; that appellants had a special interest in the matter, owned real estate through which the road passed, and had never given the right of way or their consent to the construction of the road, nor had their lands been condemned for that purpose; and that appellee had no right to collect tolls on said road.

Accompanying the complaint, and as a part thereof, there was filed, as an exhibit, the report of an engineer and inspector, appointed by the board of commissioners of Bartholomew county, upon the condition of the road.

Said report was filed with the board of commissioners in December, 1875, and, among other things, states that the road, commencing at a certain described point on said county line and extending in a westerly direction, as described in the articles of association, for a distance of three and three hundred and eleven thousandths ($3\frac{311}{1000}$) miles, to a certain described point, was completed and in such condition as to authorize the taking of tolls for travel thereon; that the road from the point last named, running in a southwesterly direction, as described in said articles of association for a distance of one and ninety seven hundredths ($1\frac{97}{100}$) miles, to a point described, is in an uncompleted condition so as not to authorize the

taking of tolls for travel over it; that the remainder of the road, as described in the articles of association, is completed and in such condition as to authorize the taking of tolls for travel thereon.

The complaint consists of two paragraphs, but they are substantially the same. The cause was continued in the Bartholomew Circuit Court for several terms, when the venue was changed to Johnson county, where a demurrer was filed and sustained to the complaint.

Appellants declined to amend, and judgment was rendered for appellee.

The error assigned is the sustaining of the demurrer to the complaint.

The complaint avers that the appellee had erected toll-gates, demanded tolls, and that appellants had paid tolls for travelling over the road.

The statute provides, that whenever three consecutive miles of the road have been completed, the company may erect toll-gates thereon and collect tolls for travel thereover. See R. S. 1881, sections 3640, 3674 and 3684.

The report of the inspector is made a part of the complaint, and which report by the statute, if not appealed from, is made conclusive evidence of the completion of so much of the road, and the right of the company to take tolls for travel thereover. The complaint, therefore, shows that for more than three consecutive miles of the eastern part of said road, the appellee had the right to erect toll-gates thereon and demand and receive tolls for the travel thereover; and the complaint does not show that appellee had erected toll-gates upon, or demanded toll for travel over, that portion of the road which was reported by the inspector to have never been completed, and was so out of repair as not to be in a condition to authorize appellee to charge or collect toll for travelling over the same. Nor does the complaint show, that the uncompleted and out-of-repair portion of the road was upon appellants' premises, so as to give them any special interest in the subject-matter

which was not equally possessed by the public in general. Without some special individual interest over that of the public in general being shown, an injunction can not be maintained. *Cummins* v. *City of Seymour*, 79 Ind. 491 (41 Am. R. 618).

The complaint does not aver that the toll-gates were closed, or that they were prevented from passing over the road without the payment of toll. A mere demand for toll without any attempt to enforce it would not justify an injunction. If the road was unfinished and any part of it was out of repair, and had remained so for an unreasonable time, appellants could successfully defend against any suit brought against them for the collection of tolls for travelling over such part of the road, without resorting to the extraordinary remedy of an injunction.

We think the complaint is insufficient, and there is no error in the sustaining of the demurrer to it.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Nov. 1, 1883.

---

No. 10,500.

## JOHNSON *v.* RAMSAY.

JUDGMENT.—*Jurisdiction.*—*Justice of the Peace.*—A judgment of a justice of the peace, rendered on summons against a resident of another county, without notice or appearance, though the record shows service, is void for want of jurisdiction, and a suit to declare it void may be maintained.

PRACTICE.—*Harmless Error.*—*Pleading.*—Demurrers to several paragraphs of a complaint were overruled, the issues on which were all afterwards found for the defendant; but there was a finding for the plaintiff and judgment upon another paragraph.

*Held*, that the rulings upon the demurrers were harmless.

91 189
136 110

91 189
139 278

91 189
140 163

91 189
144 607
145 678
146 159

91 189
149 559
151 207
151 208

91 189
160 215

From the Shelby Circuit Court.

*J. B. McFadden* and *E. S. Stilwell*, for appellant.

*T. B. Adams* and *L. T. Michener*, for appellee.

BICKNELL, C. C.—This was a written motion by the appellant, in February, 1882, to revive a judgment against the appellee, rendered in November, 1859, by a justice of the peace.

The motion alleged the rendition of the judgment, the issuing and return unsatisfied of an execution thereon, in November, 1859; that the justice's certificate of such return had been lost or mislaid, and after diligent search could not be found; that a transcript of the judgment was filed in the clerk's office of the court of common pleas of the proper county; that afterwards the plaintiff in the judgment died, and his administrator, in 1875, assigned the judgment to the plaintiff; and that the same had never been paid. The motion was duly verified, it was substantially a complaint; a demurrer to it for want of facts, etc., was overruled.

The defendant filed an answer in denial and a cross complaint. The cross complaint averred that the transcript was filed in the clerk's office of the Shelby Circuit Court, on April 9th, 1881, and it set forth a copy of the transcript, which contained the following recitals, to wit:

"Summons issued on the 9th day of November, 1859, and handed to John G. Applegate, returnable the 12th day of November, 1859, at one o'clock in the evening. Summons returned served as commanded. Now to wit, on the day set for the trial of this cause as above stated, comes the plaintiff, and the defendant, although three times called, comes not but makes default, and it appearing that he has been duly served with process more than three days before the time of the trial hereof it is therefore considered," etc.

"I assign the above judgment to William R. Johnson without recourse. BEN. FARMBROUGH."

The cross complaint then avers that "Said judgment ought to be declared void for the following reasons:"

1. The summons was not delivered to nor served by a constable, nor by a deputy constable, nor by a special constable.

3. The summons was not served upon defendant by read-

ing, nor by copy, and defendant did not appear, nor authorize anybody to appear for him.

4. When the suit was commenced, and at the time of trial, defendant was not a resident of Sugar Creek township, but was then, and for more than a month next preceding had been, a resident of Franklin county, Indiana, and knew nothing of the suit or judgment for more than thirty days after its rendition, and said suit was not commenced by capias.

5. The plaintiff is neither the legal nor the equitable owner of the judgment; the same belongs to the estate of Anselm Farmbrough, the plaintiff in said judgment, who died intestate, before the commencement of this proceeding.

6. Defendant was never indebted to said Farmbrough, who brought said suit and took said judgment with the fraudulent and wicked purpose of cheating, defrauding and injuring the defendant.

7. After the rendition of said judgment, more than twenty years had expired before the commencement of this proceeding. Wherefore the defendant prays that said judgment be declared satisfied, or that it be declared null and void, that he may have all other proper relief. The plaintiff moved "to strike out each of the 1st, 3d, 4th, 5th, 6th, and 7th specifications contained in the cross complaint, and this motion was sustained as to specifications 5 and 6, and overruled as to specifications 1, 3, 4 and 7."

The plaintiff then filed separate demurrers to each of the said specifications 1, 3, 4 and 7, styling them as separate paragraphs of the cross complaint; these demurrers were overruled.

The plaintiff then answered the cross complaint by a general denial.

The issues were tried by the court, who, at the request of the parties, made a special finding of the facts and stated conclusions of law thereon, as follows:

"1. That the judgment declared upon in the original motion in this case has not been paid, but remains due.

"2. That the execution therein asked for should not be

ordered, for the reasons hereafter found, upon the cross complaint filed herein.

"And upon the evidence introduced in support of the cross complaint of said Ramsay, the court finds:

"1st. That at the time of the issuing and pretended service of the summons in the case of Anselm Farmbrough against Eugenius Ramsay by Wm. Croddy, justice of the peace in and for Sugar Creek township, Shelby county, Indiana, the said Eugenius Ramsay was not a resident of Sugar Creek township, nor of said Shelby county, but was a *bona fide* resident of Posey township, in Franklin county, Indiana, and had no notice of the pendency of said suit, nor did he appear to the same, whereof the court states, as a conclusion of law, that the said justice of the peace had no jurisdiction of the person of said Ramsay in said action, and that the said judgment is void."

The record states that, "to the above finding of facts and conclusions of law the plaintiff excepted," and that he also moved for a new trial, alleging that the finding was not sustained by sufficient evidence and was contrary to law. This motion was overruled, but there is no bill of exceptions, and no error is assigned upon the overruling of the motion for a new trial. Judgment was rendered upon the finding, and the plaintiff appealed. The errors assigned are:

1. Overruling the motion to strike out paragraphs 1, 3, 4 and 7 of the cross complaint.
2. Overruling the demurrers to said paragraphs.
3. That the court erred in its conclusions of law.

Upon a special finding of facts and conclusions of law stated thereon, if the facts are found contrary to the evidence, the remedy is a motion for a new trial, properly followed by an assignment of error upon the overruling thereof. An exception to the conclusions admits that the facts are correctly found for the purpose of determining the validity of such exception. In the present case there was no error in the conclusions of law, because, the court having found it to be true, as alleged in the 4th specification of the cross complaint, that

the defendant was not a resident of the township in which he was sued, and had no notice of the suit, it is clear that, in an ordinary civil action commenced by summons before a justice of the peace, a judgment rendered in one township against a resident of another township, who had no notice and did not appear, is without jurisdiction and void. *Horner* v. *Doe*, 1 Ind. 130.

There was no available error in overruling the motion to strike out parts of the cross complaint. *Morris* v. *Stern*, 80 Ind. 227.

The remaining error alleged is that the court erred in overruling the demurrers to paragraphs 1, 3, 4 and 7 of the cross complaint.

These are not separate paragraphs, but are really mere specifications of the grounds for relief.

This court has held that such specifications may be demurred to as if they were separate paragraphs, and that they are analogous, in this respect, to several sets of words in a complaint for slander, and to several breaches in a declaration on a bond. *Mustard* v. *Hoppess*, 69 Ind. 324; *Ricketts* v. *Spraker*, 77 Ind. 371.

Therefore, as to each specification the question is, whether its matter, in connection with the appropriate introductory and concluding averments of the pleading of which it is a part, is sufficient in law. The appellant says that "the 1st, 3d, 4th and 7th paragraphs or specifications, are in effect, substantially the same," and therefore he considers them together, but we think they are substantially different, and we will consider first the 4th specification, which alleges the defendant's non-residence in the township, and that he had no notice of the suit.

The appellant contends that this fourth specification is bad, because, as he says, it makes a collateral attack on the judgment; but the attack made upon the judgment in this case is not a collateral attack; it is a direct attack upon the judgment,

alleging it to be null and void, and seeking to have it so declared. *Brickley* v. *Heilbruner*, 7 Ind. 488; *Grass* v. *Hess*, 37 Ind. 193.

In *Brickley* v. *Heilbruner*, *supra*, the facts were similar to the facts here—a summons issued by a justice was returned served by reading, judgment was taken by default, a transcript was filed in the clerk's office, execution was issued thereon. The execution defendant brought suit in the court of common pleas to vacate the judgment, because when the suit was commenced, summons served and judgment rendered, he was a resident of another township. The court of common pleas dismissed the suit; but, on appeal, this court said: "The proceedings before the justice were in evidence. They show affirmatively that he had jurisdiction of the person as well as the cause. The validity of the judgment could not, therefore, be questioned collaterally. But the present is a direct proceeding, in which the judgment itself is sought to be annulled. It follows that the record involves the inquiry, whether the justice had or had not jurisdiction of the person. * * * For the debt sued on, Brickley, *at the time of suit*, was liable before a justice in his own township, and not elsewhere. The result is, Kellogg" (the justice) "proceeded without the scope of his authority. The summons was therefore a nullity; and we know of no rule or principle of law that required Brickley to answer it. Hence, it seems to us, that the judgment is invalid. The prayer of the complaint should have been granted."

In *Grass* v. *Hess*, *supra*, the facts were the same, and this court said: "The case of *Brickley* v. *Heilbruner*, 7 Ind. 488, involved the point in question here. * * * The court held, in that case, that the defendant, when served with process to appear out of his own township, need not appear and make the objection before the justice of the peace."

The cases show that in Indiana an application to the proper court to vacate the judgment of a justice, rendered against a person not a resident of the township in which the suit was brought, is a direct attack upon the judgment; and they also

show that, upon such a direct attack, you may prove the want of jurisdiction over the person and the nullity of the summons, notwithstanding a recital in the record that the defendant was duly served with process.

The case at bar is much stronger than either of the cases last cited. In those cases the parties were actually served with the summons, but were not sued in their own townships; but here the averment of the fourth specification is not only that the defendant was sued out of his own township, but that he actually had no notice whatever of the suit until more than thirty days after the judgment was rendered. See *Packard* v. *Mendenhall*, 42 Ind. 598; *State, ex rel.*, v. *Hudson*, 37 Ind. 198; *Cavanaugh* v. *Smith*, 84 Ind. 380.

There was no error, therefore, in overruling the demurrer to the fourth specification of the cross complaint, and the cases cited by the appellant, to the effect that proceedings to restrain by injunction the collection of a justice's judgment can not be sustained, where the plaintiff has an adequate remedy by appeal or otherwise, do not apply. These were all cases of collateral attack upon judgments of justices or other inferior tribunals. See *Baragree* v. *Cronkhite*, 33 Ind. 192; *Hume* v. *Conduitt*, 76 Ind. 598. The distinction between such collateral attacks and a direct proceeding to annul and vacate a judgment, is thus stated in *Earl* v. *Matheney*, 60 Ind. 202: "If, according to the facts averred in this complaint, the judgments sought to be enjoined are void, the complaint is sufficient; if the judgments are merely irregular or erroneous, though reversible on appeal, the complaint must be held insufficient." So, in *Ricketts* v. *Spraker*, 77 Ind. 371, this court said: "Many, if not all, of the cases cited by the appellants were direct attacks upon the validity of the proceedings, and in such cases the rule is very different from that which obtains where the attack is a collateral one." See also *Marshall* v. *Gill*, 77 Ind. 402; *Sims* v. *City of Frankfort*, 79 Ind. 446; *Caskey* v. *City of Greensburgh*, 78 Ind. 233. In *Argo* v. *Barthand*, 80 Ind. 63, this court said, that "judgments

of inferior courts can not be assailed in a collateral way on account of errors and irregularities merely." In *De Haven* v. *Covalt*, 83 Ind. 344, this court held, that a personal judgment, although irregular and voidable, but not void, can not be collaterally attacked by injunction to prevent its collection by execution. There are a great many cases which hold that a complaint to enjoin the collection of a justice's judgment which is voidable, but not void, is a collateral attack which will not prevail against the presumptions in favor of judicial proceedings, and can not be sustained when the plaintiff has an adequate remedy at law, by appeal or otherwise. But the distinction between such cases and the case at bar is clearly pointed out in *Brickley* v. *Heilbruner*, *supra*, and *Grass* v. *Hess*, *supra*, which have never been overruled, or even questioned in Indiana.

The demurrer to the 4th specification of the cross complaint having been correctly overruled, and the record showing that the finding upon the cross complaint was made exclusively upon that specification, establishing the facts that the defendant was sued out of his own township, and was not notified at all, a judgment upon such a finding can not be reversed for errors in overruling demurrers to the other specifications; such errors would be harmless. *Indianapolis, etc., R. R. Co.* v. *Taffe*, 11 Ind. 458; *Blasingame* v. *Blasingame*, 24 Ind. 86; *Peery* v. *Greensburgh, etc., T. P. Co.*, 43 Ind. 321.

The finding sustains the cross complaint, as to the issue joined on specification No. 4, but upon the issues arising on specifications 1, 3 and 7, there is no finding; the burden of proof as to these issues was upon the defendant. The finding, therefore, was equivalent to a finding against the defendant upon these issues, and for this reason, even if the demurrers to specifications 1, 3 and 7 were improperly overruled, the errors would be harmless. *Talburt* v. *Berkshire L. Ins. Co.*, 80 Ind. 434.

There is no error in the record available to the appellant.

The judgment does not exactly correspond with the find-

ing, but there was no objection made below either to the form or the substance of the judgment. *Ingel* v. *Scott*, 86 Ind. 518.

The appellee assigns cross errors, but as the judgment is to be affirmed, these cross errors need not be considered.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Nov. 1, 1883.

---

No. 8984.

91 197
127 291

## CONNER ET AL. *v.* WELLS.

DEED.—*Mistake.—Description.—Reformation by Purchaser at Sheriff's Sale.—Equity in Lands.*—By reason of a misdescription of lands in a deed, a grantee did not obtain the legal title, but was put in possession. Before the mistake was discovered the lands were sold on execution against the grantee, and A. became the purchaser and took possession.

*Held*, that A. acquired no title either at law or in equity, and could not maintain a suit to reform the deed.

From the Jackson Circuit Court.

*B. H. Burrell, F. Emerson, R. Applewhite* and *J. B. Brown*, for appellants.

*W. K. Marshall, L. F. Brannaman* and *W. T. Brannaman*, for appellee.

MORRIS, C.—The appellee commenced this suit for the purpose of correcting and reforming a deed executed by the appellant Conner and his wife to the appellant Alexander M. Thompson.

The complaint states that for ten years prior to the 1st day of October, 1868, James C. Wells and the said Alexander M. Thompson had been partners in business; that, on the — day of July, 1864, as such partners, they borrowed $1,000 of one Samuel Louden, for the use of the firm, and gave to said Louden their note for the money borrowed; that they invested

the money borrowed in the purchase of 200 acres of land, lying on Salt Creek, Jackson county, Indiana; that the title to the 200 acres of land so purchased was taken in the name of the said James C. Wells, though it belonged to him and Thompson as partners; that in the year 1865 the appellant Charles W. Conner was the owner in fee of 200 acres of land, situated in said county and State, to wit: The N. W. ¼ of the N. W. qr., and the E. ½ of the N. W. qr., and the W. ½ of the N. E. qr., of sec. 5, township 5 north, of R. 4 east; that said Thompson and said Conner agreed to exchange said lands, Thompson agreeing to procure a conveyance of the 200 acres owned by him and said James C. Wells to be made to said Conner, and the said Conner agreeing to convey his 200 acres to said Thompson; that Thompson was also to assign to said Conner $500 in notes belonging to him and Wells as boot money between said tracts of land; that Thompson assigned the notes as agreed to said Conner, and procured the said James C. Wells to convey to him the land situate on Salt Creek, and put him in the possession of the same; that at the same time the said Conner and wife executed to the said Thompson a deed, which was intended to convey to him the 200 acres of land owned by said Conner and agreed by him to be conveyed to said Thompson; that said Conner put the said Thompson in possession of the 200 acres of land so intended to be conveyed, and that he remained in possession of the same until it was subsequently purchased by said Wells, at which time he surrendered the possession to the said Wells. It is stated that the said Alexander M. Thompson agreed with said Wells that for his half of said land on Salt Creek he would pay said note and the interest thereon, executed by them to said Louden for $1,000; that he failed to pay the same, and that on the — day of December, 1869, he renewed said note in the name of Thompson and Wells, but failed to pay the same; that Louden, the payee of the note, sold and assigned it to Daniel J. Harrall, who instituted suit on the same

against Wells and Thompson, and recovered a judgment thereon for $1,147.78, and $88.25 costs, on the 25th day of October, 1871, in the court of common pleas of Jackson county; that an execution was afterwards issued on said judgment, which was, by the sheriff of said county, on the 21st day of April, 1872, duly levied upon the 200 acres of land intended to be conveyed by said Conner to said Thompson, as the property of said Thompson; that said sheriff, having advertised said land for sale, duly sold the same to the said James C. Wells for the sum of $1,236.03, and executed to him a proper certificate of purchase for the same; that the said James C. Wells assigned said certificate to Alexander A. Davidson, who assigned it to the appellee; that the land not having been redeemed within the time allowed by law, the sheriff, by a proper deed, conveyed the same to the appellee.

It is alleged that after the sheriff's sale the said Thompson abandoned said land to said James C. Wells, who took possession of the same and has since put the appellee in possession. It is further alleged that the scrivener who wrote the deed made by Conner and wife to said Alexander M. Thompson made a mistake in copying the description of the land, describing the same as the northwest quarter of the northwest quarter of section five, town five north, of range four east, and the east half of the northwest quarter of the northeast quarter of the same section, town and range, containing 200 acres, more or less; that the grantors and grantee did not discover the mistake in said deed; that it was executed by and through the mutual mistake and oversight of all the parties; that they all intended to have a correct and accurate description of all the 200 acres; and that at the time the parties believed that the deed did contain a complete description of said 200 acres; that the mistake was not discovered by any one until about a year before the commencement of this suit; that since the mistake was discovered the appellants are all claiming to have and hold some interest in said 200 acres of land;

that in February, 1879, the appellee prepared a quitclaim deed, containing a true and correct description of the land intended to be conveyed by the Conners to Thompson, presented the same to said Conners and asked them to execute it, but that they refused so to do.

The prayer is that the deed from the Conners to the said Alexander M. Thompson be reformed and corrected so as to describe the 200 acres of land intended to be conveyed correctly, and that the plaintiff's title to said land be quieted, etc.

The appellants demurred to the complaint for want of facts. The demurrer was overruled.

The appellants answered and filed a cross complaint. The cause was put at issue and submitted to a jury for trial, who returned a verdict for the appellee, upon which, over a motion for a new trial, judgment was rendered.

The errors assigned question the rulings of the court upon the demurrers and the motion for a new trial.

Did the court err in overruling the demurrer to the complaint?

According to the averments of the complaint, Alexander M. Thompson had, at the time of the sheriff's sale, the legal title to 60 acres of the land sold, and the equitable title to the balance, being 140 acres and the land now in dispute. Did the legal or equitable title to this 140 acres pass to James C. Wells by the sheriff's sale and deed? The Conners had agreed to convey this 140 acres to Thompson, but by the mutual mistake of all the parties, it was not contained in the deed which was intended to convey it. The title to this 140 acres was not retained and held by the Conners, at the time of the sheriff's sale, pursuant to any fraudulent agreement between them and Thompson, for the complaint expressly avers that the mistake was not known to any of the parties until after the sale. The case is not, therefore, within those of *Musselman* v. *Kent*, 33 Ind. 452, *Pennington* v. *Clifton*, 11 Ind. 162, and *Tevis* v. *Doe*, 3 Ind. 129.

On the contrary, the facts alleged in the complaint bring it within the rule as held in the cases of *Terrell* v. *Prestel*, 68 Ind. 86; *Dickinson* v. *Nelson*, 4 Ind. 160; *Orth* v. *Jennings*, 8 Blackf. 420; *Modisett* v. *Johnson*, 2 Blackf. 431.

In the first of the above cases, it was held that a judgment was not a lien upon real estate purchased by the judgment debtor, but, through the mutual mistake of the parties, not described in the deed intended to convey it, for the reason that the purchaser had nothing more than an equitable interest in the land. If, as seems to be clear, at the time of the sheriff's sale, Thompson had an equitable interest only in the 140 acres in dispute, it could not, unless the title was fraudulently retained by the vendor at the instance of the vendee, be sold upon execution. This is expressly decided in the case of *Gentry* v. *Allison*, 20 Ind. 481. The court say: "The judgment upon the execution issued was no lien on the property; the bank had not the legal title, and the result is that the sheriff's sale was inoperative and did not invest the plaintiff with any effective interest in the premises." This conclusion is based upon the case of *Modisett* v. *Johnson*, *supra*; and in the case of *Jeffries* v. *Sherburn*, 21 Ind. 112, the same question is decided.

It follows that, upon the facts stated in the complaint, the appellee's grantor, James C. Wells, obtained no title by the sheriff's sale to the 140 acres of land, not contained in the Conners' deed to Thompson, and had, therefore, no right to demand a reformation of the deed from the Conners to the appellant Thompson so as to embrace the 140 acres. The demurrer to the complaint should have been sustained.

It is insisted by the appellee that the verdict and judgment upon the cross complaint should stand though the judgment on the complaint should be reversed. We do not think so. The whole case should be reversed back to the first error; had the demurrer to the complaint been sustained, there would have been no occasion for a cross complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee, with instructions to sustain the demurrer to the appellee's complaint.

Filed Nov. 1, 1883.

No. 10,620.

## CHALFANT *v.* PAYTON ET AL.

CONTRACT.—*Wager.*—*Public Policy.*—*Marriage Benefit Company.*—A contract to pay a sum of money on condition that the payee do not marry within two years, and if he do then to pay a certain sum per day during the time he shall remain single, is contrary to public policy, and, therefore, illegal and void, and money paid in consideration of such contract can not be recovered back, the parties being *in pari delicto*.

From the Jay Circuit Court.

*D. T. Taylor* and *J. M. Smith*, for appellant.

*J. W. Headington* and *J. J. M. LaFollette*, for appellees.

FRANKLIN, C.—Appellant sued appellees for money had and received, and upon four several certificates of membership in the Immediate Marriage Benefit Association of Dunkirk. The appellees are sued as partners.

The certificates show that there was an assumed corporation that issued them, and that appellee Payton was acting as its president, and appellee Monroe as its secretary, in the issuing of the certificates. The record nowhere shows the relation of the other appellees with the institution.

The complaint consists of five paragraphs. The 1st is the common count for money had and received; the 2d, 3d, 4th and 5th are based upon the several certificates of membership, one in each of the classes of benefits. Class A, at the rate of $.65 per day; class B, $1.30 per day; class C, $1.65 per day; class D, $5.50 per day, for each day until the applicant should be married.

The certificates were dated October 18th, 1881, and the

applicant was married November 9th, 1881. The certificates were issued to one Moody the applicant, and at the same time were transferred by delivery to appellant.

A demurrer was sustained to each of the paragraphs of the complaint that was based upon any one of the several certificates.

An answer in three paragraphs was filed to the 1st paragraph of the complaint. The first was a denial; a demurrer was sustained to the 2d and overruled as to the 3d. A reply was filed to the 3d, and the cause was submitted to the court for trial. At the request of appellant, the court made a special finding, and stated its conclusions of law. Appellant excepted to the conclusions of law, and judgment was rendered for appellees.

The errors assigned are:

1st. Sustaining the demurrer to the 2d, 3d, 4th and 5th paragraphs of the complaint.

2d. Overruling motion to strike out 2d and 3d paragraphs of the answer.

3d. Overruling the demurrer to the 3d paragraph of the answer.

4th. Overruling exceptions to the conclusions of law.

The certificates are all alike except as to the amounts to be paid in by the applicant and paid out by the association.

These paragraphs of the complaint correspond with the respective certificates.

Counsel have discussed the 5th paragraph, based upon the certificate in class D, and have applied their reasoning alike to each of the others.

That exhibit reads as follows:

"EXHIBIT D.

"No. 71. $3,960.

"*The Immediate Marriage Benefit Association of Dunkirk, Indiana. Class D.*

"This certificate of membership witnesseth: That the Immediate Marriage Benefit Association of Dunkirk, Indiana,

in consideration of the representation made in the application for membership, and payment of thirty dollars for membership fee, and the future payment to be made of all future assessments of nine dollars on the lawful marriage of each member or maturity of certificate of membership as it occurs in the class herein stated (except where there be funds in the hands of the treasurer to the credit of the class sufficient to pay four or more benefits), and the sum of one dollar and eighty cents monthly during the continuance of this membership, do hereby constitute John P. Moody, of Portland, county of Jay, State of Indiana, a member, with one membership in Class D of the Immediate Marriage Benefit Association, subject to the conditions and agreements herein contained.

"The Immediate Marriage Benefit Association hereby promises and agrees that after due notice and satisfactory proof of the lawful marriage of the said member has been received at the office of the association, at Dunkirk, in the State of Indiana, and within sixty days from the receipt of the proof of such marriage, to pay to John P. Moody, at the office of said association, the sum of five dollars and fifty cents for each day that said member has kept the certificate in force, and not to exceed the sum of three thousand nine hundred and sixty dollars, to be paid out of the benefit fund.

"The association further agrees that at the expiration of two years from date hereof, and this certificate be in force, to pay according to the rules and regulations of the association to the holder hereof a sum such as will equal ninety-five per cent. for each contributing member in said class, and not to exceed the sum of thirty-nine hundred and sixty dollars.

"This certificate is issued to and accepted by the above named member upon the following express conditions and agreements:

"1st. The person to whom the certificate is issued agrees to pay to the association a monthly due and the assessments which may be made against him or her as herein above stipu-

lated. The monthly dues and assessments shall be paid to the secretary at the office of the association within thirty days after the same becomes due.

"2d. The above named member further agrees that if said monthly dues and assessments made from time to time are not received by the association within thirty days from the time they become due, then in every such case the certificate shall be void and of no effect, and all money paid, and all rights and benefits which may have accrued, shall be forfeited, and all liability of the association shall cease. But any member who has forfeited membership shall, upon application, be restored to membership, upon the payment of all arrearages, provided the time of lapse be not longer than sixty days after forfeiture.

"3d. A printed or written notice of an assessment directed to the address last given by each member, and deposited in the postoffice in Dunkirk, Jay county, Indiana, shall be deemed sufficient notice. Due notice must be given to the association by each member of any change by him or her of residence, postoffice address, etc.

"In witness whereof the said Immediate Marriage Benefit Association has hereunto affixed its corporate seal, and [L. S.] has caused this certificate to be signed by its president and secretary, in Dunkirk, State of Indiana, this 18th day of October, A. D. 1881.

"W. W. PAYTON, President.

"W. MONROE, Secretary."

This paragraph of the complaint avers that the appellees were doing business as partners in the name and style of the "Immediate Marriage Benefit Association, of Dunkirk, Indiana," and as such partners, on the 18th day of October, 1881, made and executed to one John P. Moody their written agreement, by which they agreed and promised to pay said John P. Moody the sum of five dollars and fifty cents for each day that said John P. Moody should keep such written agreement in force, which he was to do by the payment

to the appellees of certain dues and assessments as promised in the written agreement, and to be paid within sixty days from the date of receiving at appellees' office proof of the marriage of said John P. Moody; that said John P. Moody assigned said written agreement to appellant by transfer and delivery; and that said John P. Moody, before the assignment of the written agreement, and appellant after the assignment thereof, kept said written agreement in force as provided by its terms, from said 18th day of October, 1881, to the commencement of this suit. And in all things the said Moody and appellant performed all the agreements contained in said written agreement for them to do and perform; but the appellees failed and refused to pay the appellant any part due him on said written agreement; but that the same is due and unpaid, and that said written agreement was executed by the appellees in the name and style of William W. Payton, president, and W. Monroe, secretary.

The question presented by counsel, upon the sustaining of the demurrer to this paragraph of the complaint, is as to the validity of the contract upon which the suit is brought.

The substance of the contract is, if the applicant will pay the association a certain sum of money down, and agree to pay such dues and assessments as it may demand, upon expressed terms, from time to time, it will pay the applicant, at the end of two years the sum of $3,960, upon condition that the applicant should not get married within that time, but if he should marry within that time, then the association was to pay him $5.50 for each day that he remained single, after the execution of the contract. The amount to be paid by the association is dependent upon the time the member refrains from marriage.

We think this contract is contrary to public policy and void. These four certificates sued on aggregate the sum of $9.10 per day for each day that said Moody remained single after the execution of the agreement, during two years, at the end of the two years, amounting to $6,645.

A promise to pay money in consideration of not marrying can not be enforced. 2 Parsons Con. 73, note (h).

These contracts, if not like marriage brokage contracts, may be properly classed as wagering contracts upon the probabilities of marriage. They are not like contracts for insurance of life or property to become due and payable upon the occurrence of some accident or casualty not under the control of either party, but they are simply wagers as to the time when Moody would marry, a matter in which appellant could have no personal interest.

Even a policy of insurance, payable on the occurrence of an event in which the party in whose favor or for whose benefit the policy has been issued, or has been assigned as a speculation, has no interest in the event, is a wagering contract and void. And whatever may be said of Moody, who made the original application for membership, and on whose marriage within the two years, the certificates are payable, clearly the appellant, his assignee, had not, nor has he yet, any interest in Moody's marital relations. If the certificates were to be considered as policies of insurance, they would be considered void as wagering contracts upon the probabilities of Moody's marriage; and the fact that the contract was made with Moody and transferred to appellant makes no difference; they are void in his hands, and he can not recover on them. *Franklin Life Ins. Co.* v. *Hazzard*, 41 Ind. 116 (13 Am. R. 313); *Franklin Life Ins. Co.* v. *Seflon*, 53 Ind. 380.

There was no error in sustaining the demurrer to the second, third, fourth and fifth paragraphs of the complaint.

The second error assigned is the overruling of the motion to strike out the second and third paragraphs of the answer.

This motion is not made a part of the record by bill of exceptions or order of the court; it is not properly in the record. *Jarvis* v. *Banta*, 83 Ind. 528. If it were properly a part of the record, the overruling of a motion to strike out a pleading is not available to reverse a judgment.

The third error assigned is the overruling of the demurrer to the third paragraph of the answer.

This paragraph of the answer is to the first paragraph of the complaint for money had and received, and alleges that such money was received by the association for fees in four memberships in the association, and for dues and assessments upon each thereof, according to the regulations of the association; that the same was voluntarily paid, with a full knowledge of all the facts; and that appellant had no interest in said Moody's marital relations. Each membership, with the fees, dues and assessments, is particularly set forth. The certificates are made exhibits.

The first paragraph of the complaint is based upon the idea that the attempted incorporation of the association was illegal and void, and that the money paid to it could be collected back from those concerned in it, as partners.

We think appellant's counsel were right in coming to the conclusion that there was no law authorizing the formation of any such corporation; but it does not necessarily follow that the money paid in can be recovered back by the one who voluntarily paid it in, or by his assignee.

Appellant, in this action, does not complain that he has been defrauded; nor are there any circumstances disclosed upon which a charge of fraud upon Moody or appellant can be based. If there was any fraud in the transaction, Moody was a member of the association, and he and appellant were parties to whatever was done. Appellant was *in pari delicto*, and can not take advantage of his own wrong. He had full knowledge of all the facts, and neither courts of law nor equity will interfere to grant parties relief under such circumstances.

We think that not only the corporation was illegal, but the business done by the association was also illegal, being contrary to public policy, as wagering contracts upon the probabilities of marriage. This paragraph of answer states facts sufficient to constitute a defence to the first paragraph of the complaint, and there was no error in overruling the demurrer to it.

The last error assigned is upon the overruling of the exceptions to the conclusions of law.

The findings are admitted to be correct, by there being no motion made for a new trial. And they substantially read as follows:

1st. That the defendants in the year 1881 filed articles of association in the office of the recorder of Jay county, Indiana, and in the office of the Secretary of State, organized and undertook to operate a corporation under the name of "The Immediate Marriage Benefit Association of Dunkirk, Indiana," and issued certificates of membership therein.

2d. That plaintiff bought four policies in said Marriage Benefit Association; that he paid fees amounting to $52, and dues and assessments amounting to $91\frac{80}{100}$.

3d. "That defendants issued to him, in accordance with his application, four policies in said association, based upon the proposition of one John P. Moody to enter into the marriage relation; and that said policies were issued in form to John P. Moody, and transferred at the time to the plaintiff, and delivered to him for the purpose of assuring to him any benefits which might arise from such policy contracts."

4th. That the dues and assessments were assessed, levied, and paid in the ordinary course of business, according to the regulations adopted by defendants and made known to plaintiff.

5th. That after the issuing of said policies the said John P. Moody married one Sarah A. Bane.

6th. That said Marriage Benefit Association on or about December 15th, 1881, suspended business, and paid nothing whatever to the plaintiff.

7th. That plaintiff complied with his part of the contracts.

8th. That plaintiff is in no wise related to said Moody, and has no special interest in his general welfare or marital relations.

9th. The defendants, at their request, had of the plaintiffs money, as above stated.

10th. The defendants did not make any express promise to repay the money.

Upon which the court states as conclusions of law:

1st. That the facts and circumstances do not raise any implied promise to repay the money to the plaintiff.

2d. At the time the money was paid by plaintiff to defendants, there was then no implied promise on their part to repay it to the plaintiff.

3d. The finding and judgment of the court is for the defendants.

For the reasons heretofore stated, we think there was no error in the conclusions of law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed November 1, 1883.

---

No. 10,680.

## THE WAYNE PIKE COMPANY *v.* BOSWORTH.

GRAVEL ROADS.— *By-Laws.— Non-Payment of Toll.*—A gravel road company has no power, under section 3642, to fix a greater penalty for the non-payment of tolls than $3, which is fixed by section 3644.

From the Adams Circuit Court.

*J. W. Headington* and *J. J. M. LaFollette*, for appellant.

*T. Bosworth* and *O. H. Adair*, for appellee.

BICKNELL, C. C.—This was an action by the appellant against the appellee for travelling upon the appellant's gravel road and refusing to pay toll therefor.

It was commenced before a justice of the peace of Jay county; the complaint was in two paragraphs, the first of which claimed a forfeiture of $100, and the second claimed a forfeiture of three dollars.

The justice rendered judgment for the plaintiff for three dollars and four cents.

The defendant appealed to the Jay Circuit Court.

The plaintiff took a change of venue to the Adams Circuit Court, on account of alleged local prejudice, and then objected to the judge of that court on account of his alleged prejudice, and the cause was tried before Judge Lowry, of the superior court of Allen county.

The defendant's answer was in three paragraphs:

1st. The general denial.

2d. That a bridge on the plaintiff's road was, and for six months had been, out of repair and dangerous. This was sworn to.

3d. That defendant's residence is on the plaintiff's road, which passes over eighty acres of defendant's land; that in said travelling, the defendant was returning from church on Sunday, and did not pass through any toll-gate.

The cause was tried by the court who found for the defendant. The plaintiff moved for a new trial, alleging that the finding was contrary to law, contrary to the evidence and unsustained by sufficient evidence.

This motion was overruled, judgment was rendered on the finding and the plaintiff appealed.

The only error assigned is overruling the motion for a new trial.

The statutory provisions, regulating suits for penalties by gravel and other roads, are as follows: Whenever three consecutive miles of such road are completed, or whenever the entire road is completed, if it be less than three miles in length, the directors of such company may erect toll-gates at such points and at such distances from each other as they may deem proper, and exact toll from persons travelling on the road, not exceeding $2\frac{3}{4}$ cents per mile for every vehicle drawn by two horses, etc. R. S. 1881, section 3640. Such company may make, enact and publish any and all ordinances and by-laws which they may deem proper, not inconsistent with the laws of this State, in order to regulate the travel upon such road, and the rules to be observed by persons

on meeting or passing with teams and vehicles, and all other matters which may be deemed for the welfare of such company. Any person, violating any ordinance or by-law made by such company, shall forfeit and pay to such company any sum not exceeding $100, to be sued for and collected by such company in an action of debt before any justice of the peace, etc. R. S. 1881, section 3642.

If any person, using any part of such road, shall, with intent to defraud such company pass through any private gate or bars, or along any other grounds near said road, to avoid any toll-gate, or shall make any untrue statement as to the distance he or they may have travelled or intend to travel on the road, or shall practice any fraudulent means and thereby avoid the payment of toll, or shall refuse to pay the toll he is bound to pay, he shall, for each and every offence, forfeit and pay to such company three dollars, which shall be recovered in the name of the company in an action of debt before any justice of the peace, etc.: *Provided*, Nothing herein contained shall prevent persons, residing in or near the line of said road, from passing thereon between the gates, about their premises, for common and ordinary business. R. S. 1881, section 3644.

The first paragraph of the complaint claims $100 under section 3642, *supra*. It alleges, among other things, that rates of toll were established by the company; that the defendant passed through the toll-gate and thereby became liable to pay certain toll, which, on demand, he refused to pay, with intent to defraud the company, whereby he violated rule 4 of the company, which provides that no person shall pass any toll-gate of the Wayne Pike Company without first tendering toll for the distance travelled or intended to be travelled on said pike; and that thereby he became liable to the penalty prescribed by said company in their 7th rule, which is as follows: 7th. Any person or persons, violating either or any of the rules of the Wayne Pike Company, shall pay to said company not less than $20 nor more than $100; and

that thereby an action hath accrued to the plaintiff to demand and have of said defendant said sum of $100 so forfeited, etc.

This paragraph states no cause of action, because said plaintiff had no right to fix by rule 7 a greater penalty for non-payment of toll than the three dollars fixed by sec. 3644, *supra*. But said first paragraph was not sustained by the evidence; it alleges that the defendant passed through the toll-gate, while the bill of exceptions shows that he did not pass through the gate, and it alleges that rates of toll were established by the company, which was necessary to be proved. *Morton G. R. Co.* v. *Wysong*, 51 Ind. 4. Yet the bill of exceptions shows that there was nothing in the records of the company showing what the rates of toll were, and that no rates of toll had ever been fixed by the stockholders of said company. Tolls must be established by the members of the company, where there is no law or valid usage to the contrary. *Morton G. R. Co.* v. *Wysong*, *supra*.

The second paragraph of the complaint seeks to recover the statutory penalty of three dollars, under section 3644, *supra*. It alleges, among other things, that the rates of toll established by the plaintiff for a two-horse vehicle were 2¾ cents per mile, and that the defendant travelled with a two-horse vehicle upon said road, two and a half miles, and passed a toll-gate upon said road, and thereby became liable to pay six cents as toll, which he, with intent to defraud the company, refused to pay, etc., whereby an action hath accrued, etc. The evidence failed to sustain this paragraph, as appears by what has been stated above in reference to the first paragraph.

There was, therefore, no error in overruling the plaintiff's motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby affirmed, at the costs of the appellant.

Filed Nov. 1, 1883.

No. 8949.

91 214
139 604

## SANDERS *v.* MUEGGE ET AL.

SHERIFF'S SALE.— *Fraudulent Conveyance.— Mortgage.—Notice.— Execution Docket.—Quieting Title.*—A judgment creditor became the purchaser, on execution, of lands fraudulently conveyed by the debtor; proper return of the execution was made, and the return recorded in the execution docket as the statute requires. R. S. 1881, section 677. Before the time for redemption had expired, the person holding the legal title mortgaged the lands for a loan of money, the mortgagee having no actual notice of the fact that the conveyance to the mortgagor was made to defraud creditors.

*Held*, that the record upon the execution docket was constructive notice to the mortgagee.

*Held*, also, that after obtaining a proper sheriff's deed the judgment plaintiff could maintain a suit against the mortgagee to quiet title.

From the Superior Court of Marion County.

*T. E. Johnson, A. C. Ayres* and *E. A. Brown*, for appellant.

*B. Harrison, C. C. Hines* and *W. H. H. Miller*, for appellees.

HAMMOND, J.—Action by the appellant against the appellees to quiet title to, and to recover possession of, certain real estate in the city of Indianapolis.

The appellee, The Thames Loan and Trust Company, answered in three paragraphs, the first of which, being the general denial, was subsequently withdrawn; and, also, filed a cross complaint against the plaintiff and its co-defendants. The appellant's demurrer was overruled to the second and third paragraphs of said answer, and also to the cross complaint. The appellant filed a special answer to the cross complaint, and to this answer a demurrer was sustained. There was a trial by the court, resulting in a finding and judgment for The Thames Loan and Trust Company. Exceptions were taken to the several rulings on the demurrers to the pleadings, and, on appeal to the general term, the appellant assigned these rulings as errors. The general term affirmed the judgment of the special term. The appellant excepted, and has assigned the judgment of affirmance as error in this court.

The contest in this court being solely between the appellant and the appellee, The Thames Loan and Trust Company, the use of the word "appellee" in this opinion will refer exclusively to that company.

The material facts in the case, as they appear in the pleadings, are set out in the brief for the appellee as follows:

"John D. Muegge was the owner of certain lots in Indianapolis, and was at the time indebted to the plaintiff. For the purpose of cheating the plaintiff out of his claim Muegge made a conveyance, his wife joining therein, on May 20th, 1875, to one Winter, who, on the same date, reconveyed the same to Emma Muegge, wife of John D. Muegge. These deeds were duly recorded, and were without consideration. Muegge had no other property subject to execution. On October 6th, 1875, plaintiff obtained judgment in the superior court of Marion county against Muegge and one Hilgemeier, who had been his partner in contracting said debt, for $818.77. Execution was issued on this judgment, and on April 19th, 1876, Muegge filed a schedule, claiming to have no property. On May 4th, 1876, the sheriff levied the execution upon the real estate above referred to.

"On the 3d of June, 1876, the sheriff sold, and the plaintiff bought, the same (said real estate) at such sale for the amount of his judgment and costs, $909.21, said plaintiff paying for said purchase by the receipt of his judgment, and by paying the costs in money. The sheriff on the 23d of June, 1876, made due return of his execution, showing such levy and sale in the usual form, and said return was recorded in the execution docket as provided by law.

"On the 10th day of July, 1876, The Thames Loan and Trust Company, in good faith and without any actual knowledge of such sale, and without any knowledge except such constructive notice as the proper records disclosed, loaned to Emma Muegge and John D. Muegge, her husband, $2,200, and took from them a mortgage on said lots as security for the payment of said sum, and the money was actually advanced.

"The fact that this loan was made in good faith and without knowledge, except such constructive knowledge as the records implied, is set up by way of answer and in a cross complaint, and the overruling by the court of the demurrers to this answer and cross complaint are the alleged errors complained of by the appellant."

It may be further stated that it is alleged in the appellant's complaint that the lots were not redeemed from his purchase at sheriff's sale, and that the appellant obtained a sheriff's deed therefor on June 14th, 1877, which was duly recorded.

The question to be considered is, whether a creditor of a fraudulent grantor, in obtaining judgment after the fraudulent conveyance, and in purchasing the real estate at sheriff's sale, under such judgment, can hold such real estate as against the claim of a mortgagee who takes his mortgage from the fraudulent grantee after the sheriff's sale, and after the return of the execution and the recording of the return, but before the execution of a sheriff's deed.

Conveyances of real estate, made with intent to defraud creditors, are void as to the persons sought to be defrauded. Section 4920, R. S. 1881. Lands fraudulently conveyed with intent to delay or defraud creditors are liable to all judgments and attachments, and to be sold on execution against the debtor. Sec. 752, R. S. 1881. While the statute makes fraudulent conveyances void as to creditors, the meaning is that they are voidable simply. If before the creditor takes the proper steps to avoid the fraudulent conveyance, the rights of innocent grantees or mortgagees intervene they are protected. But when the creditor elects in any manner provided by law to avoid the fraudulent conveyance, then such conveyance, as to him, is the same as though it had never had an existence. A deed or mortgage thereafter executed by the fraudulent grantee is, as to the creditor, absolutely void.

Under the facts stated in the appellant's complaint, he might have brought an action in the first instance to set aside the fraudulent conveyances and to have an order for the sale of

the property to satisfy his judgment. It was his privilege, however, to have the execution on his judgment levied upon the real estate and to have the real estate sold without any previous proceeding to set aside the fraudulent conveyance. He chose the latter method, and, in pursuing this method, he did all that he was required to do. He had an execution issued and levied upon the lots. The sale was publicly advertised as required by law. He became the legal purchaser of the land at the sheriff's sale. Under the law of redemption, he could not obtain a sheriff's deed for one year after the sale. But he received from the sheriff a certificate of purchase. He was not guilty of *laches* in not having this certificate recorded. At that time there was no law providing for the recording of certificates of purchase at sheriff's sales. The recording of an instrument not authorized to be recorded is not constructive notice to any person. *Brown* v. *Budd*, 2 Ind. 442. The sheriff made return of the execution and the return was recorded in the execution docket as provided by law. By these proceedings, the appellant was placed in a situation where, in one year after the sale, if the real estate was not in the meantime redeemed, he would be entitled to a sheriff's deed. This deed would vest in him all the title held by the judgment debtor at the date of the levy. And at that time such debtor must be regarded, we think, as the owner of the lots as to the appellant's judgment.

It is insisted by counsel for the appellee that if the appellant, before proceeding by execution, had brought an action to subject the lots to sale to pay his judgment, the *lis pendens* record would have been his protection. And it is urged that he was guilty of laches in not pursuing that remedy. In answer to this it may be said that while the appellant had the remedy suggested, the law also gave him the one which he adopted, and that he should not be held guilty of *laches* for selecting it in preference to the other.

But it can not be said in this case that the appellee, in taking its mortgage after the sheriff's sale to the appellant, and

after the return of the execution had been duly recorded, is to be regarded as an innocent mortgagee without notice. We think that it was chargeable with constructive notice, and that ordinary prudence in investigating its mortgagor's title would have given it actual notice of the appellant's claim. Sec. 517 of the code of 1852, being sec. 677, R. S. 1881, provides that "The clerk of every court of record shall keep an execution docket, in which he shall enter all executions as they are issued by him, specifying, in proper columns, the names of the parties, the amount of the judgment, and the interest due at the issuing of the execution, and the costs, and prepare an additional column, in which he shall enter at length the return of the sheriff; and such docket entries shall be taken and deemed to be a record." Under this statute, it was held in *Maddux* v. *Watkins*, 88 Ind. 74, that the return of the sheriff to an execution upon sale of real estate, after its entry by the clerk in the execution docket, was constructive notice as to its contents to a subsequent purchaser of the land.

The appellee's mortgage, as we have seen, was taken on July 10th, 1876. An examination of the proper deed records would have shown it that John D. Muegge, one of the parties against whom the appellant obtained his judgment, owned the land on May 20th, 1875, when he conveyed to Winter, who, on the same day, reconveyed to Muegge's wife. A further examination of the proper court records would also have shown the appellee that in less than five months after these conveyances the appellant obtained a judgment against Muegge and another for $818.77; that an execution, issued on this judgment, was levied upon the real estate, and that said real estate was sold at sheriff's sale to the appellant on the 3d day of June, 1876. Of all this there was a public record, of which the appellee was bound to take notice at the time it accepted its mortgage.

In the case of *Brown* v. *Niles*, 16 Ill. 385, an execution was issued to a county other than that in which the judgment was rendered, and was levied upon land which was held in the

name of a fraudulent grantee of the judgment defendant. On the day of the levy, in compliance with a statute of that State, a certificate of the levy was filed in the recorder's office of the county where the levy was made. Afterwards the fraudulent grantee conveyed to one who purchased for value without notice of the fraud, and without actual notice of the levy. It was held that the filing with the recorder of the certificate of the levy was notice of the rights of the judgment creditor in the land levied upon. It was said by the court in that case:

"If the filing of the certificate of levy in such case is not notice to subsequent purchasers, neither would the sheriff's deed, or the record thereof, be; and Brown could have defeated the execution and levy by selling the land at any time, until ejectment brought by the purchaser at the sheriff's sale. This ejectment could not be brought until after sale and the period of redemption had expired, which would exceed fifteen months. This construction of the statute would render worthless an ordinary and well known remedy.

"The judgment creditor, where the debtor's lands have been conveyed to defraud creditors, may disregard the fraudulent conveyance while the lands remain in the hands of the fraudulent grantee; may levy upon the same, and the purchaser at sheriff's sale may bring ejectment, and, at law, avoid the fraudulent conveyance. In such case, the purchaser has but to prove the judgment, execution and sheriff's deed, and that the conveyance of the judgment debtor was made to defraud, delay, or hinder his creditors to recover.

"He recovers upon the strength of the lien. When then should the lien attach? Precisely when it would have attached had the avoided conveyance never been executed: at the time of filing the certificate of levy.

"As to such creditor, the statute makes the fraudulent deed void, and his execution levied and certificate filed in the proper office, ought to be constructive notice of his rights to avoid the deed."

As fully sustaining the above case, and the principle we

hold in this, that the entry of the sheriff's return in the execution docket, showing the sale to the appellant, was notice to the subsequent mortgagee from the fraudulent grantee, see *Reed* v. *Smith*, 14 Ala. 380; *Hoke* v. *Henderson*, 3 Dev. (N. C.) 12; *McCreery* v. *Pursley*, 1 Marshall (Ky.) 114; *Anderson* v. *Roberts*, 18 Johns. 515.

*Crockett* v. *Maguire*, 10 Mo. 34, may be distinguished from the case at bar and from the cases above cited. In that case the land was never in the name of the fraudulent debtor. He purchased the land and paid the consideration, but had the conveyance made to another. The land was sold on execution against him and the sheriff's deed recorded. Afterwards the land was conveyed by the fraudulent grantee to one who had no notice of the fraud and no actual knowledge of the sheriff's deed. It was held that the registry of the sheriff's deed was not constructive notice. The opinion gives prominence to the fact that the land had not been in the name of the debtor, and that there was, therefore, no evidence in the records that the title ever came through him. The court, in its opinion, takes care to distinguish that case from *Anderson* v. *Roberts*, *supra*, where it was held that when there is a deed, fraudulent because made to defraud creditors, and subsequent conveyances are made by the fraudulent grantee to *bona fide* purchasers, such purchasers are protected only where their conveyances are prior in time to a sale on execution at the suit of a creditor of the fraudulent grantor.

Our conclusion is that the appellant's claim to the land derived from his purchase at sheriff's sale was fully protected by the return of the execution and its entry in the execution docket, and that the record thus made was constructive notice to the appellee.

This view of the case compels us to hold that the trial court erred in overruling the appellant's demurrer to the second and third paragraphs of the appellee's answer, and also erred in overruling his demurrer to the appellee's cross complaint.

Judgment reversed, at appellee's costs, with instructions to

the court below to sustain the demurrers above mentioned, and for further proceedings in accordance with this opinion.

ELLIOTT, J., did not participate in the decision of this case.

Filed Nov. 2, 1883.

No. 10,536.

## SOUTH ET AL. *v.* SOUTH ET AL.

WILL.—*Devise.—Power to Convey.—How Executed and Shown.—Deed.—Intention.*—Where there is a devise of some estate in lands, coupled with a power to convey the fee absolutely, the deed of the devisee made with intent to execute the power will convey the fee, and this intent is matter *in pais* to be collected from all the circumstances of the case, and does not depend wholly upon the terms or recitals in the deed, as a deed of general warranty, purporting to convey the fee upon a consideration fairly equal to the value of the estate.

| | |
|---|---|
| 91 | 221 |
| 124 | 29 |
| 91 | 221 |
| 129 | 87 |
| 91 | 221 |
| 135 | 658 |
| 91 | 221 |
| 137 | 652 |
| 139 | 72 |
| 91 | 221 |
| 146 | 489 |
| 91 | 221 |
| 148 | 484 |
| 91 | 221 |
| 155 | 155 |

From the Hendricks Circuit Court.

*C. Foley*, for appellants.

*J. V. Hadley*, *E. G. Hogate* and *R. B. Blake*, for appellees.

ELLIOTT, J.—The will of Henry South contains these provisions: "I will and bequeath unto my beloved wife, Sally South, all my estate both real and personal, she paying all my just debts and funeral expenses, so long as she may live, and what may be left at the time of her death, of either my personal or real estate, to be sold at public sale, and the proceeds thereof to be equally divided between my heirs, under the laws of this State, and I hereby give my said wife full power and authority over the same during her natural life."

"I also give her full authority to dispose of any of my personal property during her life that she may think proper, either for the payment of my debts or for any other purpose that she may see proper, or to make any changes in the same that she may think proper, and if my personal estate shall become exhausted, then, and in that case, I hereby authorize my said wife to sell and convey the real estate in as full and

ample a manner as I could do if I were living, provided she remains of sound mind; and it is my will, and I hereby direct that my wife shall consult with my son Benjamin, in relation to making any sale of the property hereinbefore authorized; and should my wife become incapable of attending to business I hereby authorize my said son to take charge of my said property and manage for her in the same manner as she is herein authorized to manage the same."

It is plain that the testator intended to vest a right in his wife to all of the property of which he died seized, and that he gave her an absolute power of disposition. The effect of the provisions we have quoted is to invest her with a right to consume all the property she chooses for her maintenance and comfort, and to sell, at her election, such property as she deems necessary for her comfortable support. That an estate is vested in her with full power of disposition, can not be doubted; the only question is as to the character of the estate, whether for life or in fee. The general rule is this: Where an estate is given in general terms, without words of inheritance, but with full power of disposition, the estate is a fee. But where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition, or to appoint the fee by deed or will be annexed, unless there be some manifest general intent of the testator which would be defeated by adhering to this particular intent. 4 Kent Com. (12 ed.) 536. It is not, however, necessary to decide whether Mrs. South took a fee or a life-estate; it is sufficient for the purposes of the case to ascertain that she took an estate in the land coupled with an absolute power of disposition, and upon this point there can be no reasonable debate.

Conceding that the widow had a life-estate and not a fee, still that life-estate was joined with an absolute power of disposition, and where this is so the deed of the devisee intended as an exercise of the power will convey a fee. The deed passes not merely her life-estate but also the estate of which she had the absolute right of disposition. This is the express

holding in the well considered case of *Clark* v. *Middlesworth*, 82 Ind. 240. If that case expresses the law correctly it rules this, and that it does do so we are well satisfied. In the case of *Barford* v. *Street*, 16 Vesey Jr. 135, the court said: "An estate for life with an unqualified power of appointing the inheritance comprehends everything." An absolute power of disposition is essentially the same as the power of appointing an estate of inheritance, for if well executed it vests the fee in the grantee.

If the instrument executed by the person having an estate in the land and the absolute power of disposition indicates an intention to exercise that power, it is a valid execution of it, and will be upheld in favor of a purchaser for value. A general warranty deed executed for a consideration equal to the value of the fee and professing to convey the fee is a valid execution of the power. This is plainly so on principle, since to hold otherwise would be to declare that the grantor did not intend to convey the estate the deed engages him to do, and that the grantee meant to receive a less estate than that which the deed purports to convey. It would also involve the absurdity of assuming that the grantor intended to charge himself with a liability upon his covenants of warranty in a case where there rested on him not the slightest obligation to take upon himself any such responsibility. The authorities, with remarkable unanimity, agree in holding that the question whether the conveyance is in execution of a power or not depends solely upon the intent. If, from the tenor and effect of the deed or will by which title is conveyed, the intent to execute the power is inferable, there is a valid execution of the power, or if, without referring to the power, the will or deed is not operative as the parties evidently intended it should operate, then it will be held a valid and effective execution of the power. It is not necessary that the power should be referred to in the deed or will, where the intent is otherwise manifested. The Supreme Court of the United States, speaking by the great equity judge, said:

"Surely, it will not be pretended, that in order to a due execution of a power, it is necessary, that it should be recited or referred to in the executing instrument of conveyance. * * * It is sufficient, if the power exists, and is intended to be executed; and that intent is matter *in pais*, to be collected from all the circumstances of the case." *Crane* v. *Morris*, 6 Peters, 598. The same learned judge, who delivered the opinion in the case just cited, gave the subject an exhaustive examination in the case of *Blagge* v. *Miles*, 1 Story, 427, and declared that "All the authorities agree, that it is not necessary, that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient, that it shall appear by words, acts or deeds, demonstrating the intention." Cases in great numbers might be cited in support of this general doctrine, but there is no reason for doing so, because, when the question is examined, it will be found that there is really no substantial conflict upon the question.

The case of *Dunning* v. *Vandusen*, 47 Ind. 423 (17 Am. R. 709), recognizes, very fully and explicitly, this general doctrine, but did not apply it to that case because it did not there appear that the consideration corresponded to the value of the estate in fee, and, as said in *Clark* v. *Middlesworth*, *supra*, this clearly distinguishes the case from one where the consideration paid is the value of the fee. That the consideration paid for the land in the case of *Dunning* v. *Vandusen*, *supra*, was not such as to raise the presumption of an intent to convey the fee is shown by the fact that the complaint showed the value of the fee to be very greatly in excess of the consideration expressed in the deed, for it is averred in the complaint in that case that the rental value of the tract for which the grantee paid $500 was $500 per year, and of the other tract, for which $270 was paid, $250 per year. This was the admitted statement of the pleading, and in the face of it the court could not well have presumed an intent to convey both the life-estate and the remainder in fee. On the facts of the case, the decision was correct, and in harmony with the general principle which we

have stated. That the case does recognize this general principle is shown by the fact that the opinion quotes from Kent *this* statement: "The power may be executed without reciting it, or even referring to it, provided the act shows that the donee had in view the subject of the power." 4 Kent Com. 334. So, too, are cited the case of *Blagge* v. *Miles*, *supra*, already quoted from, and the case of *Jones* v. *Wood*, 16 Pa. St. 25, and from the opinion in the latter case the court copied this language: "When the donee of a power to sell land possesses, also, an interest in the subject of the power, a conveyance by him, without actual reference to the power, will not be deemed an execution of it, except there be evidence of an intention to execute it, or, at least, in the face of evidence disproving such intention." It is true that while thus giving recognition to the general principle, the court incidentally does refer to an English case where a somewhat stricter doctrine was held, but this doctrine was not adopted, nor was there anything more than a passing statement of it. To have adopted the strict rule would have been to fly in the face of all the well considered modern cases. There are eminent English authorities which refuse assent to the strict rule of *Sir Edward Clere's Case*, 6 Co. 18, and favor that of Sir Edward Coke, in *Scrope's Case*, 10 Coke, 143. In speaking of this rule Chief Justice BEST said: "The rule given by Lord Coke is larger than that which has been deduced from the decision in Clere's case. Lord Coke's rule will be complied with if the intention to execute a power be *unequivocally manifested* by any circumstances occurring in the case, or any act of the owner of the power, without requiring any specified overt acts of such intention." *Nowell* v. *Roake*, 2 Bing. 503. In the comparatively recent case of *In re Teape's Trusts*, 6 Moak Eng. R. 801, a view was taken which harmonizes with that expressed by Chief Justice BEST. In the case just cited, the owner of the power disposed of the estate entrusted to him by will without making any reference to the power, and it was held that the power was well exe-

cuted, the court saying: "But, after all, the reasonable view to take of the words is, that he meant to give his wife the largest interest he could give in everything he had to dispose of; and, if that was a terminable interest, she will take it to the full extent of his disposing power, which, in this case, was for her own life." The American cases are in unbroken array against the strict rule of Clere's case.

In *Amory* v. *Meredith*, 7 Allen, 397, the subject was well discussed, and the court repudiated the strict English rule and quoted what Lord St. Leonards said after reviewing the old English cases. "It is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property." Against the strict rule of Clere's case and in favor of the one that the intention will control, however manifested, or however established, will be found, among others, the cases of *Willard* v. *Ware*, 10 Allen, 263; *Bangs* v. *Smith*, 98 Mass. 270; *Funk* v. *Eggleston*, 92 Ill. 515 (34 Am. R. 136); *Wimberly* v. *Hurst*, 33 Ill. 166; *Butler* v. *Huestis*, 68 Ill. 594 (23 Am. R. 589); *Andrews* v. *Brumfield*, 32 Miss. 107; *Munson* v. *Berdan*, 35 N. J. Eq. 376; *White* v. *Hicks*, 33 N. Y. 383; *Drusadow* v. *Wilde*, 63 Pa. St. 170. In the latter case it was said: "It is only when the words of the will may be satisfied without supposing an intention to execute the power that it is no execution." It is said in Pomeroy's Equity Jurisprudence, sections 589, 590, that equity will enforce the defective execution of a power, because, "An attempt having been made to execute the power, which is only formally defective, equity imputes to the donee in making the attempt an intent to fulfill this *quasi* obligation." Judge Story says: "And where the intention to pass the property comprised in the power is clearly established, the court will give effect to the intention, although there is no intention expressed to act in execution of the power." 1 Story Eq. 174 *a*.

We turn now to the cases directly supporting the proposition that a deed of general warranty, purporting to convey a

fee and made upon full consideration will execute the power. An able opinion is found in *Hall* v. *Preble*, 68 Me. 100, in the course of which it was said: "It is not necessary that there should be an express declaration in the deed that it is made in execution of the power. It is sufficient if the deed purports to convey a fee. When a person conveys land for a valuable consideration, he must be held as engaging with the grantee to make the deed as effectual as he has the power to make it." At another place, the court, speaking of the person in whom the power was vested, said: "But she had a right and interest in the premises to convey them in fee for her sole use and benefit. Her power was not to convey in behalf, and for the use of another. It was to convey for herself. Having granted all her right, title and interest in the premises to the tenant to hold in fee, she can not be held as having conveyed to him her life-estate only, still holding the power to convey to another in fee. She conveyed for full value. Her deed sufficiently declares her intention to convey under the will, and by it the tenant took a fee." The question received consideration in *Campbell* v. *Johnson*, 65 Mo. 439, and it was held that the execution of a warranty deed for a full consideration was a due execution of the power. The court there said, referring to cases sustaining this view: "The cases referred to are of high authority; they have the sanction of great names, and, avoiding the refinements and subtleties investing the doctrine of powers, they announce a rational and just rule, founded upon a liberal and enlightened equity. In the language of Lord Redesdale, 'when a person acts for a valuable consideration, he is understood in equity to engage with the person with whom he is dealing, to make the instrument as effectual as he has power to make it.'" The subject came before the Supreme Court of Ohio and a like conclusion was reached, the court saying: "In any view of the rules on the subject, we think the deed may be properly regarded a sufficient execution of the power. We think no instance can be found where the property which is the subject of the power is distinctly described

and referred to, and the disposition made of the property would fail, unless considered as made under the power, and there is no other objection to the mode of the disposition except the want of express reference to the power, that the execution of the power has been held to be invalid." *Bishop* v. *Remple*, 11 Ohio St. 277. In *Yates* v. *Clark*, 56 Miss. 212, a like conclusion was reached, the court saying: "Each deed conveys a fee, which she did not have in her own right, and which she could only convey by virtue of said will, and each deed contains a covenant of warranty of the title conveyed. It is manifest that it was intended to execute the power conferred by the will." In *Orr* v. *O'Brien*, 55 Texas, 149, this doctrine is declared, or to speak more precisely, acted upon without question.

There are many well considered American cases holding that where one having a power of disposition exercises it by will, it is a valid execution of the power without referring to or reciting it. The intent manifested by the will is all that is necessary to execute the power, and this intent is sufficiently evidenced by a disposition of the entire interest in the property. There is no material diversity of opinion upon this subject, and the rule is to be taken for good and established law, as truly it is upon sound principle. If it be sound law, then it applies, as indeed the cases hold, to deeds as well as to wills; it is impossible to discover any difference between the instances, for they are but instances, resting upon one fundamental principle, and illustrated by many cases.

The rule is as just in operation as it is strong in principle. To hold that the failure to refer to the power avoids the conveyance is to sacrifice the substance to the shadow. Of little, trivial importance is the mere form of the instrument as compared with the substance of the transaction and the intention of the parties. A woman having a clear right to sell the fee of the land for her support, selling it for that purpose, executing a deed professing to convey the whole estate in the land to her grantee, he yielding a consideration reasonably equiv-

alent to the value of the land, and she, intending to convey that estate, ought, in equity and justice, to be held to have conveyed the fee and executed the power, and the purchaser ought not to be deprived of what he had bought and paid for, because of a mere failure to refer to the power.

We affirm the judgment.

Filed Nov. 2, 1883.

No. 10,266.

## TRAYLOR ET AL. *v.* DYKINS, AUDITOR, ET AL.

91 229
157 253

PLEADING.—*Complaint.—Demurrer.—Legal Capacity to Sue.*—A demurrer to a complaint, assigning as cause for demurrer, that the plaintiffs have not the legal capacity to sue, refers only to some legal disability of the plaintiffs, such as their infancy, idiocy or coverture, and not to the fact, if it be the fact, that the complaint fails to show a right of action in the plaintiffs.

COUNTY LIBRARY.—*County Clerk, Auditor and Recorder, Ex-Officio Trustees.—Powers and Duties.—Surplus Library Fund.*—Under section 3784, R. S. 1881, the clerk, auditor and recorder of the county are *ex-officio* trustees of the county library, and, as such trustees, they are authorized by section 3788, R. S. 1881, to loan the surplus library fund for any term not exceeding five years, with seven per cent. interest payable annually in advance.

SAME.—*Mortgage to Trustees.—Estoppel.*—When it appears that the defendant has borrowed the surplus fund of the county library, and has executed his note and mortgage therefor to the county clerk, auditor and recorder, as trustees of the county library, he is estopped from denying the corporate existence of such library, or that the officers named are *ex-officio* trustees of the library, and, therefore, the trustees of an express trust.

PRACTICE.—*Harmless Error.—Supreme Court.*—A judgment will not be reversed by the Supreme Court, for an error in sustaining a demurrer to a paragraph of answer, when it appears that all the evidence, admissible under such paragraph, is also admissible under another paragraph of answer remaining in the record. Such an error is a harmless one.

From the Scott Circuit Court.

*W. K. Marshall*, for appellants.

*C. L. Jewett* and *H. E. Jewett*, for appellees.

HOWK, J.—This was a suit by the appellees against the appellants for the foreclosure of a certain mortgage and the collection of the debt secured thereby. The cause was put at issue and tried by the court, resulting in a finding for the appellees, and judgment was rendered accordingly.

The first error complained of by the appellants, in this court, is the overruling of their demurrer to appellees' complaint. The suit was brought by and in the names of the several persons who were, at the time of its commencement, the auditor, the clerk, and the recorder of Scott county, as trustees of the Scott County Library, for the use of such library. In their complaint, the appellees alleged in substance, that on the 6th day of April, 1870, the appellants executed a mortgage conveying to "the auditor, clerk and recorder of Scott county, Indiana, trustees of the Scott County Library, for the use of such library," certain real estate particularly described in Scott county, as security for the payment of a debt evidenced by the appellants' promissory note, of even date with the mortgage, for the sum of eleven hundred and sixty-six dollars and thirty-three cents, due in five years from date, with seven per cent. interest payable annually in advance; that the note was given to secure a loan of the surplus funds, belonging to such library, loaned under the provisions of "An act authorizing county libraries to loan certain funds, and regulating the same," approved March 11th, 1861; and that the note and interest were due and wholly unpaid. Wherefore, etc.

The appellants demurred to the complaint, upon two grounds of objection, namely:

1. That the appellees had not the legal capacity to sue; and, 2d. That the complaint did not state facts sufficient to constitute a cause of action.

As to the first ground of objection to the complaint, that the appellees had not the legal capacity to sue, it is settled by the decisions of this court, that this cause of demurrer has reference only to some legal disability of the plaintiff, such

as infancy, idiocy or coverture, and not to the fact, if such be the fact, that the complaint, upon its face, fails to show a right of action in the plaintiff. *Debolt* v. *Carter*, 31 Ind. 355; *Dale* v. *Thomas*, 67 Ind. 570; *Nave* v. *Hadley*, 74 Ind. 155. Certainly, it was not apparent upon the face of the complaint in this case, that the appellees or either of them were incapacitated to sue by reason of any legal disability.

Under the second ground of demurrer, appellants' counsel insists that the allegations of the complaint fail to show any right of action in the appellees, upon the note and mortgage in suit. In this position, we think, counsel is mistaken. In section 3 of "An act for the incorporation of county libraries," approved June 18th, 1852 (section 3784, R. S. 1881), it is provided as follows: "The clerk, auditor, and recorder shall have the charge of such library, and are hereby constituted trustees for that purpose. * * * They shall cause all moneys appropriated or belonging to the library to be expended in the purchase of books," etc. In section 3788, R. S. 1881, in force since March 11th, 1861, it is provided as follows: "Any county library that may have been organized under special laws in this State, and yet maintains its organization, and shall have a portion of its funds reserved for replenishing the library from time to time, may loan said surplus fund for any term not exceeding five years, with interest payable annually in advance, at the rate of seven per cent. per annum."

It is manifest, we think, that the note and mortgage, counted upon in appellees' complaint in this case, were executed by the appellants and received by the appellees, under and in intended conformity with the statutory provisions above quoted. The statute makes the auditor, the clerk, and the recorder *ex-officio* trustees of the county library, and gives them the power to dispose of the library funds; and, under the later statute, the surplus of such funds might be loaned, as therein provided. Construing these statutes together, it seems to us that the trustees of the county library were thereby au-

thorized to loan the surplus of the library fund. Under the statute the clerk, the auditor and the recorder of Scott county were *ex-officio* trustees of an express trust; and in the note and mortgage in suit the appellants contracted with the clerk, auditor and recorder of Scott county, as such trustees. The appellees, therefore, as the trustees of an express trust, were authorized to sue in their own names, on the note and mortgage, without joining with them the corporation for whose benefit the action is prosecuted. Sec. 252, R. S. 1881. The appellants, having contracted in express terms with the clerk, auditor and recorder of Scott county, as such trustees, are in no condition to question the right of the appellees, as the successors in such trust, to maintain this action on their contracts. *Weaver* v. *Trustees*, 28 Ind. 112; *Heavenridge* v. *Mondy*, 34 Ind. 28; *Musselman* v. *Cravens*, 47 Ind. 1.

Our conclusion is, that the court committed no error in overruling the demurrer to appellees' complaint.

The appellants jointly answered, in six paragraphs, of which the first was a general denial of the complaint, and the second stated generally that there was no consideration for the note and mortgage described in the complaint. The third, fourth, fifth and sixth paragraphs of answer severally stated special matters by way of defence; and to each of these paragraphs the appellees' demurrers were sustained by the court. To each of these rulings the appellants excepted, and each ruling is here assigned as error.

The substance of the third paragraph is, that the appellees were not the real parties in interest, and were not the trustees of an express trust. We think this paragraph was clearly bad. The appellants having contracted with the clerk, auditor and recorder of Scott county, as trustees of the Scott county library, were estopped to deny the corporate existence of the library, or that the officers named were the trustees of such library, or that the appellees, as such officers and trustees, were the trustees of an express trust. *McBroom* v. *Corpora-*

*tion of Lebanon*, 31 Ind. 268; *Ray* v. *Indianapolis Ins. Co.*, 39 Ind. 290; *Mackenzie* v. *Board, etc.*, 72 Ind. 189.

In each of the fourth, fifth and sixth paragraphs of answer the appellants alleged in different forms of expression, that the note and mortgage in suit were given by them without consideration. If, therefore, the court erred in sustaining the demurrer to either or all of these paragraphs of answer, it is manifest that the error or errors were harmless. For any and all facts, tending to show that the note and mortgage were given by the appellants without consideration, were admissible in evidence under the second paragraph of answer. A judgment will not be reversed for harmless errors. *Evansville, etc., R. R. Co.* v. *Baum*, 26 Ind. 70; *Wolf* v. *Schofield*, 38 Ind. 175.

We find no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Nov 2, 1883.

---

No. 11,080.

## The State *v.* Dupies.

Criminal Law.—*Minors.*—*Billiards.*—*Indictment.*—An indictment for the violation of section 2087, R. S. 1881, by permitting a minor to play billiards which does not aver that the act of the defendant was unlawful, or show that the case was within the exception contained in section 2089, is bad on motion to quash.

From the Benton Circuit Court.

*M. H. Walker*, Prosecuting Attorney, and *I. H. Phares*, for the State.

*D. E. Straight, U. Z. Wiley* and *D. Smith*, for appellee.

Niblack, C. J.—This was a prosecution for a misdemeanor upon an indictment containing two counts.

The first count charged that "one Nicholas Dupies, late," etc., "on the 3d day of January, A. D. 1883, at," etc., "did then and there have the care, management and control of a

pool and billiard table, and did then and there allow, suffer and permit one Alfred Moore, a person under twenty-one years of age then and there being, to play two games of pool at and upon such table with one Charles Fisher."

The second count charged, substantially, the same offence as the first, the only noticeable difference being that the table was described as a pool table only, and only one game was alleged to have been played.

Upon the defendant's motion both counts of the indictment were quashed, upon the ground that neither one of them charged him, the defendant, with having "unlawfully" allowed, suffered and permitted the minor, Alfred Moore, to play pool upon the table under his control.

Section 2087, R. S. 1881, defining the offence intended to be charged by the indictment in this case, is as follows:

"If any person owning or having the care, management, or control of any billiard table, pool table, or any kind of gaming table, bagatelle table, or pigeon-hole table, shall allow, suffer, or permit any minor to play billiards, bagatelle, pool, or any other game at or upon such table or tables, he shall, upon conviction thereof, for each game so allowed, suffered, or permitted to be played, be fined in any sum not more than fifty dollars nor less than five dollars."

Section 2088, immediately following, provides that if any person owning or controlling such tables as those above enumerated, kept in any saloon, hotel, or other public place, shall allow, suffer or permit minors to congregate at, in or about where such tables are kept, he shall be fined not more than fifty dollars nor less than five dollars.

Section 2089 declares that "The provisions of the two foregoing sections shall not apply in any case where a billiard table, pool table, bagatelle table, or pigeon-hole table may be kept or used in a private family."

As the exception in favor of tables kept in private families is contained in a subsequent section, it need not be expressly negatived in an indictment under either section 2087 or sec-

tion 2088, but such an indictment ought to state facts sufficient to constitute an offence under one of those sections. *Alexander* v. *State*, 48 Ind. 394; *State* v. *Maddox*, 74 Ind. 105. This statement of facts should, therefore, at least inferentially, show that the table played upon, or congregated around, was not a table kept or used in a private family where such playing and congregating is not prohibited, and are, consequently lawful.

The general rule is, as contended, that it is sufficient to charge an offence in the language of the statute defining it, but that rule is not of universal application, and especially in cases like this, where two or more sections of a statute have to be construed together. In our estimation this case affords an exception to that general rule. *Bates* v. *State*, 31 Ind. 72; *Schmidt* v. *State*, 78 Ind. 41; *State* v. *Welch*, 88 Ind. 308.

We think the indictment before us should either have charged that the defendant "unlawfully" allowed, suffered or permitted the person named to play pool on the table under his control, or to have averred facts from which the unlawful character of the transaction might have been fairly inferred, and that for a failure to charge the one, or to aver the other, the indictment was materially and fatally defective.

The particular questions discussed at the present hearing were neither presented nor considered by this court in the case of *Moore* v. *State*, 65 Ind. 213, referred to in argument. In that case it was averred that the table was neither kept nor used in a private family. The plain inference from that averment was that the playing upon the table charged in the indictment was "unlawful." The indictment in that case was, for that reason, essentially different from the indictment in this.

As to when an offence ought to be charged to have been "unlawfully" committed, reference is made to the cases of *State* v. *Maddox*, 85 Ind. 585; *Ready* v. *State*, 62 Ind. 1.

The judgment is affirmed.

HAMMOND, J., was absent when this cause was considered.

Filed Nov. 2, 1883.

No. 10,225.

## LEAMAN *v.* SAMPLE.

91 236
155 632

PROMISSORY NOTE.—*Principal and Surety.—Former Adjudication.—Surety.—Contribution.*—In a suit against three on a promissory note, two of whom are sureties, an answer to the complaint by one that he is liable only as surety, and a judgment accordingly, and that the property of the other two be first exhausted, is not an adjudication which binds the other surety so as to bar a suit by him against his co-surety for contribution.

From the Hancock Circuit Court.

*W. R. Hough* and *W. W. Cook*, for appellant.

*D. S. Gooding* and *M. B. Gooding*, for appellee.

BICKNELL, C. C.—This was a complaint to review a judgment for error of law apparent in the record.

John N. Leaman sued George W. Sample, alleging in his complaint, that he and Sample had been sureties for Isaac Leaman, and that he had been compelled to pay the entire debt; he sought to recover from Sample one-half of the amount paid.

Sample answered in two paragraphs:

1. The general denial. 2. That the matters alleged in said complaint had been fully heard, tried, adjudicated and determined between the parties at the March term, 1876, of the Hancock Circuit Court.

A demurrer to said second defence was overruled; a reply was filed in denial; the issues were tried by the court, who, on request, made a special finding of facts and stated conclusions of law thereon, as follows:

1. Notes were executed by Isaac Leaman as principal and said John N. Leaman and George W. Sample as sureties; judgment was rendered thereon against all of them, and John N. Leaman was compelled to pay it.

2. In the suit on said notes Sample answered separately, admitting the execution of the notes by him, and averring that he "signed the same as surety and not otherwise," and praying that there be no stay of execution on the impending

judgment, unless the replevin bail would agree to pay the same on failure of the other defendants to pay it.

3. All of said defendants answered jointly that Isaac Leaman was principal and John N. Leaman and George W. Sample were sureties on said notes, and that both of said notes were composed of illegal and usurious interest, for which they demanded judgment.

4. The plaintiff in said suit replied in denial of each of said special defences.

5. Neither Isaac Leaman nor John N. Leaman filed a demurrer or any other pleading to said separate answer of Sample alleging his suretyship, nor was any objection made to said separate answer, but the cause was tried by the court upon the issues joined; the court found for the plaintiff and assessed his damages at $264.57, and also found that George W. Sample was only surety, and rendered judgment against the defendants, with a direction that execution thereon be first levied of the property of the Leamans, and that there be no stay of execution, unless the replevin bail should undertake specially to pay the judgment, in case the amount thereof could not be levied of the principal defendants.

6. No objection or exception to the said finding and judgment was taken by any of the parties.

Upon the foregoing facts the court stated the following conclusions of law:

"Said finding and judgment of the Hancock Circuit Court constitute an adjudication between the parties to this suit of the matters and things involved herein, and it is final and conclusive upon them, as to said question of suretyship, and the law is with the defendant."

The court found for the defendant. The plaintiff John N. Leaman excepted to the conclusions of law. Judgment was rendered upon the finding against the plaintiff, who now demands a review of that judgment, and alleges in his complaint for review the following errors of law as apparent upon the record:

1. This amounts to nothing, and need not be further considered. It alleges as error of law that the defendant's second paragraph of answer was insufficient.

2. The court erred in overruling the plaintiff's demurrer to the second paragraph of the defendant's answer filed in said cause.

3. The court erred in each of the conclusions of law drawn from the facts as specially found in said cause:

4. The court erred in its decision upon the questions of law involved in said cause and the trial thereof.

This fourth specification amounts to nothing; the only errors of law properly charged in the complaint for review are the second and third.

The defendant Sample filed a demurrer to said complaint for review for the following causes:

1. Because the complaint does not state facts sufficient to constitute a cause of action.

2. Because there is a defect of parties defendants, in this, that Isaac Leaman should have been made a party defendant.

This demurrer was sustained by the court, and the plaintiff declining to amend his complaint for review, judgment was rendered against him on the demurrer. He appealed. The errors assigned are as follows:

1. Sustaining the demurrer to the complaint.

2. Rendering judgment in favor of the appellee.

This second assignment of error presents no question. Buskirk Prac. 112, and cases there cited.

As to the first error assigned, the complaint for review was not defective for want of parties. Isaac Leaman was not a party to the proceeding sought to be reviewed, and had no interest in it. *Sloan* v. *Whiteman*, 6 Ind. 434; *Douglay* v. *Davis*, 45 Ind. 493.

Upon the other ground of demurrer, it was not error in the proceeding sought to be reviewed to overrule the demurrer to the second paragraph of the defendant's answer, which alleged a former adjudication; that answer was substantially

good; it alleged that "The matters alleged in the complaint had been fully heard, tried, adjudicated and determined between the parties at the March term, 1876, of the Hancock Circuit Court." If it was uncertain or not sufficiently specific, such defect is not available upon demurrer. *Wright* v. *Williams*, 83 Ind. 421; *Marquess* v. *LaBaw*, 82 Ind. 550; *Pittsburgh, etc., R. W. Co.* v. *Hunt*, 71 Ind. 229.

But in the proceedings sought to be reviewed, the court did err in its conclusions of law. The facts found did not show an adjudication of the question of suretyship as between the parties John N. Leaman and George W. Sample. The finding shows that the notes were executed by Isaac Leaman as principal and John N. Leaman and George W. Sample as sureties. There was no cross complaint in the case, and no issue between the sureties as to the question of suretyship between them.

George W. Sample's separate answer admits the signing of the notes, but states that he signed them "as surety, and not otherwise," and asks that there be no stay of execution on the judgment that may be rendered unless, etc

Then all the defendants, principal and sureties, filed a joint answer, in which they allege that Isaac N. Leaman was the principal in the notes, and that George W. Sample and John N. Leaman were sureties. The plaintiff, the principal, replied to these answers, but there was no issue between the sureties. It seems clear that the separate answer of Sample was intended as, and amounted to no more than, an objection to a stay of execution under section 700, R. S. 1881; any surety may make this objection. Sample's separate answer simply avers that he signed the notes "as surety, and not otherwise," without saying whether he was surety for one or both of his co-defendants; his separate answer, therefore, is not inconsistent with the joint answer which expressly avers that he and John N. Leaman were both sureties. There being no issue in the original suit on the notes, as to the question of suretyship between the appellee and the appellant, there could be in that

case no legal and binding adjudication of that question as to them.

Therefore, the conclusion of law in the proceeding sought to be reviewed, that "The finding and judgment of the Hancock Circuit Court constitute an adjudication between the parties to this suit of the matters and things involved herein, and is final and conclusive upon them as to said question of suretyship, and that the law is with the defendant," was wrong. There being no such adjudication, the other facts specially found show that the plaintiff in that suit was entitled to recover from the defendant one-half the money which the finding shows that said plaintiff paid.

The complaint for review, therefore, was sufficient, and the court erred in sustaining the demurrer to it. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to overrule the demurrer to the complaint.

Filed Nov. 3, 1883.

---

No. 10,426.

91 240
126 324

## MCCULLOCH *v.* MCDONALD ET AL.

COMMON CARRIER.—*Wrongful Delivery.—Liability.—Damages.*—Where a person is engaged in the business of a common carrier by teams, and delivers the goods entrusted to him to the wrong person, and the goods are thereby lost, such carrier is liable for the loss. The fact that the consignor hands the driver of the team an envelope, containing a bill of the goods, to be signed by the consignee, properly directed to the consignee, but upon the corner the wrong street is named, furnishes no excuse for delivering the goods to the wrong person.

From the Floyd Circuit Court.

*D. C. Anthony*, for appellant.

*A. Dowling*, for appellees.

McCulloch *v.* McDonald *et al.*

BEST, C.—The appellees, who do business under the firm name of "McDonald & Co," brought this action against the appellant before a justice of the peace, where they recovered judgment. Upon appeal to the circuit court, the cause was tried and judgment again rendered for the appellees for $171. A motion for a new trial, for the alleged reasons that the verdict was not sustained by sufficient evidence, and was contrary to law, was overruled, and this ruling is assigned as error.

The appellant was a common carrier engaged in transporting merchandise by teams between the city of New Albany, Indiana, and the city of Louisville, Kentucky, and on the 22d day of March, 1881, the appellees shipped by him thirty barrels of flour, of the value of $171, to Edward Klein in Louisville, Kentucky, which was never delivered to the consignee, but was delivered to I. Kling, and was wholly lost to the appellees. These facts, which are undisputed, rendered the appellant *prima facie* liable for the loss. This is not disputed, but the appellant claims that his failure to deliver the goods to the proper person was caused by the failure of the appellees to give proper direction for the delivery, and that in consequence thereof he is exonerated from liability.

At the time these goods were shipped the appellees furnished the teamster of appellant with a dray or wagon ticket in these words:

"NEW ALBANY, IND., March 22, 1881.

"Received of McDonald & Co , by E. Cline, Louisville, per McCall wagon, 30 bbls. 15 N. P., 15 bcy flour," as was the custom, and this ticket, upon the delivery of the flour, was to be signed by the consignee and was to be returned to the consignor. In addition to this, a bill of the flour was made to E. Cline, placed in a sealed envelope and directed "E. Cline, Louisville, Ky." Upon the right hand corner of the envelope, the words "Walnut and Jackson" were written. The envelope was then given to the teamster, to be by him delivered with the flour. I. Kling was doing

business as a baker at the intersection of Walnut and Jackson streets in Louisville, and Edward Klein about four squares distant upon the corner of Campbell and Walnut. The appellant had transported a load of flour at a previous time by another teamster for appellees, and delivered it to Edward Klein, but the driver of this team was unacquainted with his place of business and took this flour to the corner of Walnut and Jackson streets, and being unable to find E. Klein, delivered it to I. Kling, who signed his name to the ticket, which was returned to the appellant and by him retained until the 3d day of May, when he returned it with others to one of the appellees, who then paid him his charges for the transportation of the flour.

These facts are undisputed, and upon them we think the appellant clearly liable for the loss of the flour. The only semblance of an excuse for his failure to deliver the flour is the fact that the words "Walnut and Jackson" were written upon the envelope, and if this fact misled him as to the place of business of Klein, it in no manner justified him in delivering the flour to another person. The flour was directed to E. Cline, and delivered to I. Kling. The names are unlike, and in this respect the directions were explicit and not misleading. The appellant could not have mistaken the one for the other by reason of any similarity in the names, and the fact that the place of business was misstated did not authorize him to deliver the goods to any other person who might be engaged in business at that point. He was bound to deliver the flour to the consignee or retain it. Nor was he justified in assuming that the appellees had misdirected the flour. In delivering it upon such assumption, he acted at his peril, and must bear the loss. In addition to all this, the evidence tends strongly to show that he was not misled by the instructions. but that he was informed before the delivery of the flour that it was probably not intended for I. Kling. Kling testified that when the flour was brought to him he informed the driver that he had not ordered it, and that it was probably not in-

tended for him; that he would take it, sign his own name to the ticket, and would not use it for a few days, so that if it was not intended for him the driver could return and get it if there was any mistake about the delivery. In this he was fully supported by his son. This testimony, if believed, completely destroyed every semblance of an excuse for the delivery of the flour to I. Kling, and as the appellant, in the absence of an excuse, was liable, the motion for a new trial was properly overruled. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellants' costs.

Filed Nov. 7, 1883.

No. 9819.

91 243
125 556

## FISCHER *v.* BELL.

91 243
170 556

CONTRACT.—*Real Estate.—Broker.—Commission.*—A contract with a real estate broker to pay him a certain sum in case he finds a purchaser for designated real estate at a price fixed, need not be in writing, and the broker, upon producing a purchaser ready, able and willing to purchase at the price and on the terms fixed, with notice thereof to his employer, is entitled to his commission, though the employer may refuse to sell.

From the Warrick Circuit Court.

*A. C. Tanner* and *W. W. Ireland*, for appellant.

*J. Brownlee*, for appellee.

FRANKLIN, C.—Appellee commenced this action in the superior court of Vanderburgh county, to recover from appellant $250, claimed as commission due appellee for procuring a purchaser for certain real estate in the city of Evansville belonging to the wife of appellant.

The action was brought upon a special contract, which was in parol, and the complaint consisted of three paragraphs: The first alleged a contract for procuring a purchaser; the second for procuring a purchaser or selling; the third for selling.

A demurrer was overruled to the first and second paragraphs, and sustained to the third, and an answer in denial was filed.

There was a trial by jury, and a verdict was returned in favor of appellee for $50. A motion by the plaintiff for a new trial was sustained, and on motion of the defendant the venue was changed to the Warrick Circuit Court, where another jury trial was had, which resulted in a verdict for the plaintiff for $250. Over motions for a new trial, and in arrest of judgment, judgment was rendered on the verdict.

The errors assigned are the overruling of the demurrer to the first and second paragraphs of the complaint, and the overruling of the motions for a new trial, and in arrest of judgment.

The first objection to the complaint is that the contract is not averred to be in writing; that the title to real estate was affected, and, therefore, the contract could not be valid unless it was in writing.

The suit is not brought upon a contract for the sale of real estate, but upon a contract to procure a purchaser, which is valid without being in writing.

The second objection is that neither paragraph of the complaint shows that the sale of the real estate was perfected by making a contract that would bind both parties in the sale.

This was not required by the terms of the contract sued upon, as contained in the first or second paragraphs of the complaint; it might have been a good objection to the third paragraph of the complaint, to which the demurrer was sustained, and, doubtless, for that reason. If the appellee performed on his part all that the contract required him to do, and was prevented from consummating a sale by the act of appellant, that is sufficient. *Lane* v. *Albright*, 49 Ind. 275, p. 279; *Hawley* v. *Smith*, 45 Ind. 183.

A real estate broker is entitled to his commission whenever he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, provided the

terms are in accordance with those specifically given to the broker by the vendor. *Love* v. *Miller*, 53 Ind. 294 (21 Am. R. 192), and authorities therein cited.

A further objection is made to each paragraph of the complaint, that, according to the terms of the contract as declared on, the sale was to be for cash, and the agreement made with the purchaser, which was attached to the complaint, permitted time to be given.

This agreement provided for a cash sale, and required the money to be paid upon the execution of the deed; but further provided that if appellant desired to retain possession of the premises, for a time, he could do so by paying rents, and the purchaser paying interest on the purchase-money.

Had the vendor signed and ratified the agreement made by his agent with the purchaser, it would have been a cash sale, because by its terms, upon the execution of the deed, he was entitled to every cent of the purchase-money.

We think both paragraphs of the complaint are sufficient, and there was no error in overruling the demurrer to them.

The first, second and third reasons for a new trial bring in review the sufficiency of the evidence to sustain the verdict.

From the evidence, it appears, that in the spring of 1880 appellant employed appellee to procure a purchaser and arrange for the sale of the said real estate; that in the summer following, about August, they agreed that appellee should have for his commission all that he could get for the property over the sum of $5,000; that one Mattison offered for the property $5,000; that the appellant was willing to take that and pay appellee $75 for his commission, but being advised by appellee that they could do better, appellant directed appellee not to take it, but to go ahead. This was perhaps in June, 1880.

That on the 29th day of November, 1880, appellee did procure a purchaser for the real estate, in the person of C. K. Drew, and on that day Drew executed a certificate of purchase, agreeing and binding himself to pay appellant fifty-

two hundred and fifty dollars for the property; that on the same day, or the day after, appellee met appellant and informed him that C. K. Drew had signed a certificate of purchase, agreeing and binding himself to pay appellant $5,250 cash for the real estate, and invited appellant to go with him to his office and see and sign the certificate; that the money would be paid as soon as the deed was executed; that appellant refused to go and sign or see the certificate; that in a short time afterwards appellee again met appellant close to Drew's office, and asked him to go with him into Drew's office and fix up the papers, and informed him that Mr. Drew was ready to pay him all the purchase-money, and appellant again declined to do so; that in a few days after that appellee and appellant met on Main street, and appellee again requested appellant to go with him to Drew's office and close up the trade, and told him that Drew was ready to pay the purchase-money and wanted the trade closed up. Appellant again refused, unless the taxes on the property were paid in addition to the $5,250. That after Drew had signed the certificate of purchase he met appellant and told him that he had bought his property of appellee, to which appellant replied, "All right;" that Drew afterwards met appellant near his office, and told him that he had signed the certificate of purchase, agreeing to pay him $5,250, $5,000 for him and $250 for appellee, to which appellant replied, "All right," and that Drew then invited appellant to come into his office and close up the trade, and that appellant declined to do so. That appellant then, on the 7th day of December following, left the city of Evansville and went up Green River, in the State of Kentucky. In a very short time before appellant left, appellee informed Drew that appellant now demanded that his taxes should be paid in addition to the $5,250. Drew requested appellee to ascertain the amount of the taxes; appellee did so and informed Drew what they were, which Drew agreed to pay in addition, rather than miss getting the property or having any trouble about it; appellee went to appellant's house to in-

form him of that fact, and was told by appellant's wife that he had gone up Green River, and might be back in a week or longer time. This was on the 8th of December. Appellee told her that Drew had agreed to pay the taxes in addition, and left. In a day or two afterwards Drew went to see her, but failed to get any satisfactory assurance that he would get the property, and on the 13th of December he purchased other property. Appellant returned home on the 14th of December, and then informed appellee that Drew might have the property, when appellee informed appellant that he was too late, that Drew had purchased other property on the day before, and would not now purchase this property, and then demanded of appellant his commission, which appellant refused to pay, and this suit was commenced to collect said commission.

We think the evidence tended strongly to sustain the verdict, and that it was not contrary to law.

The fourth reason stated for a new trial is the refusal of the court to give the sixth instruction asked by appellant. This instruction is not referred to by appellant in his brief, and, therefore, no question is presented for consideration upon this reason for a new trial; under this reason, however, counsel have discussed the 5th instruction asked. We see no error, however, in refusing that instruction, if it had been included in the motion for a new trial.

The fifth reason is for modifying and giving as modified the 3d instruction asked by appellant. That instruction reads as follows: "Unless the jury believe from all the evidence in the case, that the writing dated November the 29th, 1880, read in evidence, contains the precise terms and conditions authorized by defendant, and that before the institution of this suit, *the contents thereof were fully explained to him*, and that afterwards he without the fault of the plaintiff refused to accept said terms and consummate the contract, they should find for the defendant."

The court modified this instruction by striking out the

words, "the contents thereof were fully explained to him," and inserting the words, "the defendant was notified thereof," in their place, and gave the instruction as thus modified.

We think there was no error in this modification. There was no controversy about the terms of the agreement; the appellant refused to see or examine it; if he had examined it and the terms did not suit him, they might have been so modified as to comply with his desires. He simply declined to consummate a sale of the property for $5,250, and when he was informed that the sale had been agreed to, and a certificate thereof was executed by the purchaser binding him to pay $5,250 for the property, that was sufficient without explaining in detail to him all the terms of the certificate.

The sixth reason for a new trial is, that the court erred in giving its first instruction of its own motion. That instruction reads as follows: "If you find for the plaintiff, the amount of your verdict should be the price or compensation agreed on by the plaintiff and defendant for the services in procuring a purchaser for the property."

It is objected to for the reason stated, that it involves two propositions, first, as to whether the plaintiff was entitled to recover anything, and, secondly, if so, how much. This instruction does not involve the first proposition; it was only intended to, and did, embrace the second. The first was fully instructed upon in the subsequent instruction. The instructions must all be taken together, one paragraph in instructions is not required to embrace all the law applicable to the case. The special contract alone was sued upon, and if the plaintiff was entitled to recover anything, he was entitled to recover according to the contract. There was no error in this instruction.

The seventh reason for a new trial is error in the court in giving the first, third and fourth instructions asked by appellee.

The first is as follows: "If the jury believe, from all the evidence, that at the time defendant placed the property in

the hands of the plaintiff for sale, he agreed to take the sum of $5,000 for his property, and made no conditions as to taxes, and agreed to pay plaintiff all he might find a purchaser willing to pay over and above that sum, or might sell the same for, as his commission for finding a purchaser, or selling the same, and that the plaintiff afterwards procured a purchaser in the person of C. K. Drew, and was prevented from selling the same to the said Drew on account of the defendant's setting up a claim for taxes, and the case is otherwise made out, they should find for the plaintiff."

The objections to this instruction, that it does not require that Drew should be a responsible person, and that it did not require the contract to be in conformity with the terms authorized, are not well taken.

The same objections are made to the third, and which objections are alike unfounded.

Appellant does not notice the fourth in his brief, and we will therefore pay no further attention to it. He, however, discusses the fifth, which is not embraced in the motion for a new trial, and presents no question for our consideration. We find no available error in the instructions given or refused.

The eighth reason for a new trial is, for permitting the plaintiff to prove what was said and done by appellant and in his presence in relation to previous proposed sales of the property to Murphy and Mattison.

This testimony was given in the defendant's cross-examination of appellee, without objection until after it was given, and then no motion was made to strike it out; no ruling was made by the court, as shown by the bill of exceptions in the record, to which an exception could be taken. No question is presented by this reason.

The ninth reason for a new trial is not discussed or insisted upon. It is therefore waived.

The tenth reason is for refusing to permit the defendant to read in evidence the original complaint filed herein on the 16th day of December, 1880.

A demurrer had been sustained to this complaint, and an amended complaint had been filed on the 11th day of April, 1881. The reason stated for reading the complaint in evidence was to show that it said nothing about the written contract for the purchase of the real estate signed by Drew.

If this ruling was erroneous, it was harmless. It makes no difference whether or not any written contract had been signed by Drew. The defendant's liability was established by the plaintiff's procuring a purchaser who was in a condition, ready and willing to pay for the property according to the terms authorized by the vendor, without the execution of any certificate.

Of course a sale could not have been consummated so as to make it valid without its being reduced to writing. But when appellee procured the purchaser, it was the duty of appellant to consummate the sale or pay appellee his commission. There was no available error in overruling the motion for a new trial. Nor was there any error in overruling the motion in arrest of judgment.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed June 23, 1883.

## ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellant, in his petition for a rehearing, claims that the court, in the former opinion herein, failed to decide an important question in relation to the correctness of the fourth instruction given by the court to the jury. True, this question is properly in the record, but appellant, in his brief, did not refer to that instruction; he discussed No. 5; and in referring to the motion for a new trial we found that it did not include No. 5, and concluded that the objection to No. 4 was thereby waived. Upon a re-examination of the record

we find that appellant made the mistake of calling the instruction he discussed No. 5 instead of No. 4. The mistake was in appellant, and not in the court. The way the record and the brief stand, no question upon either of these two instructions is properly before the court, but to give appellant the benefit of the question that he intended to present, we proceed to consider the fourth instruction. It reads as follows:

"If you believe from the evidence, that after plaintiff had notified the defendant of the signing of the certificate of purchase by the said Drew, and (he was) requested to sign the same, the defendant purposely avoided the plaintiff and the said Drew, negligently and purposely failed to attend to said business in a reasonable manner, and the defendant purposely absented himself from the city and State, and by reason of such conduct upon the part of the defendant, said sale was defective, and the case is otherwise made out, you should find for the plaintiff."

This instruction is applicable to evidence given in the cause, and is correct in so far as it goes. It does not profess to state all the facts necessary to make out the case, but expressly adds, "and the cause is otherwise made out." If the appellant desired instructions upon other facts necessary to make out the case which were not stated in the instruction given, it was his duty to ask the court to give such instruction. Having failed to ask for additional instructions, he can not complain that the instructions were not more fully given.

Appellant further insists that he did not intend to waive the ninth reason for a new trial, which was an objection to the evidence introduced upon which the fourth instruction was based; that to save a repetition of his argument upon the seventh reason for a new trial, he referred to that as applicable to the ninth. If the argument and reasoning upon the seventh was applicable to the ninth, the decision of the questions upon the seventh was alike applicable to the similar questions on the ninth. Not to repeat in a decision is cer-

tainly as commendable as not to repeat in a brief, and no harm was done in not discussing the ninth reason for a new trial.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled, at the costs of appellant.

Filed Nov. 3, 1883.

---

91 252
147 615

91 252
148 378

91 252
169 210

No. 9928.

## TAYLOR *v.* BURK, EXECUTOR.

DECEDENTS' ESTATES.—*Aggrieved Party.—Appeal to Supreme Court.*—Under sections 2454 and 2455, R. S. 1881, any person considering himself aggrieved by *any* decision of a circuit court, growing out of any matter connected with a decedent's estate, may prosecute an appeal to the Supreme Court, in the manner and within the time prescribed therein. Such an appeal is not governed by the provisions of section 632, R. S. 1881, regulating appeals from final judgments in civil actions.

SAME.—*Final Settlement Report.—Exceptions.—Trial of Questions of Fact.—Burden of Issue.—Open and Close.*—Where the executor or administrator submits to the court his final settlement report, in the matter of his decedent's estate, and exceptions are filed to such report, requiring the trial of questions of fact, the burden of the issue is on the executor or administrator to sustain and establish the correctness of his report, and he has the right to open and close both the evidence and argument, on the trial of the cause.

SAME.—*Property Omitted from Inventory.—Instruction.—Error.*—Where it appears in the written objections and exceptions to the confirmation of the final settlement report, that the decedent was possessed, at the time of his death, of money, notes, accounts and other property, which came to the hands of his executor and had not been charged to him either in his inventory of the estate or in any subsequent report, and specifying, among other items of the decedent's property, a certain promissory note, a sum of money in gold and another sum in currency, and evidence is introduced tending to sustain the exception as to each of the specifications, it is error for the court to instruct the jury, that if the decedent, in his lifetime, gave the note or any part of it to the executor and perfected the gift by delivery, they must find for the executor "on this exception."

SAME.—*Evidence.—Testator's Unsoundness of Mind.*—Where, on the trial of

such exception, the executor has introduced evidence tending to prove a settlement between him and his testator, during the last illness of the latter and only a few days before his death, under which he had surrendered the executor's note to him for but little more than one-half of its face value, and when there is other evidence before the jury tending to show that, at the time of such settlement, the testator was eighty years old, of unsound mind and incapable of transacting business, it is error to instruct the jury that they must not consider the question of the soundness or unsoundness of mind.

PRACTICE.—*Interrogatory to Jury.—Error.*—There is no error in the court's refusal to propound an interrogatory to the jury, at the request of a party, when such request is absolute and unconditional, and not in the event they render a general verdict.

From the Fayette Circuit Court.

*B. F. Claypool, J. H. Claypool, L. W. Florea,* and *G. C. Florea,* for appellant.

*W. A. Cullen, B. L. Smith, J. I. Little* and *R. Conner,* for appellee.

HOWK, J.—On the 6th day of April, 1881, the appellee, Burk, executor of the last will of Benjamin P. Hegerman, deceased, submitted to the court his final settlement report in the matter of his testator's estate. By this report the appellee showed to the court that he had fully administered his testator's estate; that there remained in his hands a surplus of such estate for distribution, amounting to the sum of $643.75; and that the appellant Mary A. Taylor, as the sole legatee of the testator under his will, was entitled to the whole amount of such surplus. The appellee asked that, upon his filing appellant's receipt for such surplus, or the clerk's receipt therefor, under the order of the court, he might be fully and finally discharged from the duties of his trust.

The appellant appeared and filed written objections and exceptions to the final settlement report, and the approval and confirmation thereof by the court. To these objections and exceptions the appellee replied by a general denial. The issues joined were submitted to a jury for trial, and a general verdict was returned for the appellee. Over the appellant's mo-

tion for a new trial, and her exceptions saved, the court rendered judgment for the appellee, approving his final report; but the court refused to discharge the appellee from his trust, and directed that he give the statutory notice of his final settlement of the estate before the next term of the court.

The only error assigned by the appellant in this court is the overruling of her motion for a new trial.

Before considering any of the questions arising under this alleged error, it is necessary that we should pass upon and decide a point made by appellee's counsel in argument, which, if well taken, would necessarily lead to the dismissal of this appeal. It is insisted by counsel, with much earnestness, that no appeal would lie to this court from the judgment below on the verdict of the jury, because it was not then adjudged that the appellee should be discharged from the duties of his trust, or that the estate of his testator was then finally settled. In other words, it is claimed by counsel, as we understand them, that the appeal in this case was taken from an interlocutory judgment merely, and not from a final judgment in settlement of the testator's estate. The point is made, and the argument in its support is based, upon the theory that the appellant's right of appeal was governed by the provisions of the civil code of 1852, regulating appeals to this court from judgments in civil cases. Section 550, 2 R. S. 1876, p. 238; section 632, R. S. 1881. This theory is wrong, however, as the appellant's right of appeal was given in, and governed by, the provisions of sections 189 and 190 of the act of June 17th, 1852, for the settlement of decedents' estates (sections 2454, 2455, R. S. 1881), wherein it was provided that any person considering himself aggrieved by any decision of the court, growing out of any matter connected with the decedent's estate, might appeal to this court in the manner prescribed therein. The appellant considering herself aggrieved by the judgment of the court, approving the appellee's final settlement report, had the right to appeal from such judgment, without awaiting the appellee's final discharge from the duties

of his trust. *Seward* v. *Clark*, 67 Ind. 289; *Bell* v. *Mousset*, 71 Ind. 347; *Bake* v. *Smiley*, 84 Ind. 212. The point made by appellee's counsel, therefore, is not well taken and is not sustained.

It is shown by the record that, at the proper time on the trial, the appellant offered to assume the burden of the issue and introduce her evidence in support thereof, and claimed the right to open and close the argument of the cause. But the court held that appellee had the burden of the issue, and permitted him to open and close the evidence and argument. There was no error in this decision of the court. In *Hamlyn* v. *Nesbit*, 37 Ind. 284, a case similar to the one at bar, upon the point now under consideration, it was said that "the administrators were required to establish the correctness of their report, in respect to such matters as were embraced in the exceptions filed by the appellants, and that this placed the burden of the proof on them, and gave them the right to begin and conclude the evidence, and to open and close the argument." So, also, in the similar case of *Brownlee* v. *Hare*, 64 Ind. 311, in holding that the administrator is the plaintiff in such a cause, the court said: "He was the moving party in the case, and was seeking to have his final settlement report of his trust approved, and to be discharged therefrom by the court. As the record comes to us, he must be regarded as the party plaintiff, and the appellees, who were objecting to the approval of his report, and were insisting that he should render to the court a definite, accurate and full report of his trust, must be regarded as parties defendants in this case."

Appellant's counsel next insist that the trial court erred in refusing to propound to the jury certain interrogatories, as asked by the appellant. The record shows "that, at the proper time, the exceptor asked the court to propound to the jury the following interrogatories in writing, viz.: Mary A. Taylor, exceptor, propounds to the jury the following interrogatories:" (Here follow interrogatories which the court refused to propound to the jury.) Section 336 of the civil

code of 1852, in force at the time of the trial (section 546, R. S. 1881), provided that in all cases, when requested by either party, the court shall instruct the jury, "if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing." There is nothing in the record to indicate either that appellant requested the court to instruct, or that the court of its own motion did instruct, the jury trying the cause, if they rendered a general verdict, to find specially upon the particular questions of fact, stated in writing by the appellant. There is no error in the court's refusal to propound an interrogatory to the jury, at the request of a party, where the request is absolute and unconditional, and not in the event that they find a general verdict. *Schenck* v. *Butsch*, 32 Ind. 338; *Hodgson* v. *Jeffries*, 52 Ind. 334; *Killian* v. *Eigenmann*, 57 Ind. 480; *Ogle* v. *Dill*, 61 Ind. 438.

The next error, of which the appellant's counsel complain in argument, is the action of the court in giving the jury, at appellee's request, the following instruction: "Hegerman had a perfect right, in his lifetime, to do as he pleased with his own property, and might, if he saw proper, give to Burk the note in dispute, or any part of it; and if he did so, and perfected the gift, by giving to Burk his, Burk's, note, you should find for the executor, *upon this exception.*" The last three words of this instruction, italicised in this opinion, were not in the transcript of the record at the time it was filed, nor at the time of the filing of appellant's brief in this court; but they have since been brought into the record by the return of the clerk below to a writ of *certiorari.*

In her written objections and exceptions to the appellee's final settlement report, the appellant stated that Benjamin P. Hegerman died possessed of money, notes, accounts and other property, which came to the hands of the appellee and had not been charged to him, as executor, either in his inventory of the estate or in his sole and final report; and among other items of such property, so received by the executor and not

charged to him, as alleged, the appellant described and specified the following item: "One promissory note on Naham H. Burk, executor as aforesaid, not inventoried or accounted for in any report of said executor, or in any other manner, of the amount of $2,600, with interest on said note on said Burk for three years prior to the death of said Hegerman, at ten per cent., amounting to $780." In her written exceptions, the appellant also averred that the appellee, as executor, had failed to charge himself with, or to account for, in any manner, the sum of $500 in gold, and the further sum of $500 in currency, belonging to his testator at the time of his death, and received by appellee as such executor.

Two objections were urged by appellant's counsel against the instruction of the court above quoted, namely: 1. That it ignored all of the appellant's exceptions to the final settlement report, except such as related to appellee's note, and directed that the jury should find for the executor, upon all matters in issue, if they found that the testator had, during life, given the note or any part of it to the appellee, and had perfected the gift by his manual delivery of the note to appellee; and, 2. That the instruction was and is not the law, either as an abstract proposition or as applied to the case in hand. Appellee's counsel claim that the first of these objections is wholly obviated or removed by the correction of the instruction, as shown in and by the return of the clerk below to the writ of *certiorari;* and, in their brief, they entirely ignore appellant's second objection to the law of the instruction. We are of opinion that the two objections of appellant's counsel to the instruction of the court, above quoted, are each well taken and must be sustained. It will be seen from the instruction, as corrected by the addition of the italicised words, that there is nothing in its language to indicate which exception is meant or intended, by the use of the phrase, "this exception." The appellant's exceptions were not separated into paragraphs, and numbered or otherwise designated; but the

first matter averred therein, which may be regarded as the first exception, was the alleged failure of the appellee to charge himself, as executor, either in his inventory or in his sole and final report, or otherwise, with the money, notes, accounts and other property, of which his testator was possessed at the time of death, and which came into the hands of the appellee, as such executor. Under this exception, as we have seen, several items were specified, such as money in gold, money in currency, and the promissory note of Burk, the executor. There was evidence introduced, tending to sustain the appellant's exceptions as to each of these specifications; and therefore the instruction quoted, even as corrected, limiting the attention of the jury and the appellant's right of recovery to only one of these specifications, was well calculated to mislead and confuse their minds, and for this reason was erroneous. *Terry* v. *Shively*, 64 Ind. 106.

Besides the instruction quoted, as an abstract proposition, is not a correct statement of the law; and certainly, as applied to this case, it was error to give such instruction. The gift of a part of Burk's note to Burk by Hegerman, in his lifetime, if perfected by the delivery of the note to Burk at the time of the gift, would have excused Burk, as executor of Hegerman, from including such part of the note in the inventory of his testator's estate, but, in that event, he should have charged himself as executor, in some manner, with the residue of the note. The gift of a part of the note, though perfected by delivery, was not a gift of the entire note; and the court erred in instructing the jury, that if Hegerman gave Burk a part of the note in dispute and perfected the gift by delivery of the note, they should find for the executor, upon that exception.

The court instructed the jury as follows: "The question of the soundness or unsoundness of Hegerman's mind is not in issue in this case, and you will not consider it." It is true that this question was not put in issue by any pleading in the

case. But when it appeared that Hegerman held Burk's note for $1,800, and the appellee had introduced evidence tending to show a settlement between him and Hegerman, during his last illness and only a few days before his death, under which settlement the note had been surrendered by Hegerman to Burk for but little more than one-half of its face; and when there was evidence before the jury to the effect that, at the time of the alleged settlement, Hegerman was eighty years old, of unsound mind, and incapable of transacting business; we are of the opinion that the question of Hegerman's mental soundness was in the case and should have been considered by the jury, in arriving at their verdict. When the appellee had given evidence of the alleged settlement between him and his testator, for the purpose of showing that he ought not to be required to charge himself, as executor, with the note in dispute or any part of it; evidence offered by appellant tending to prove that Hegerman, at the time of such settlement, was of unsound mind and incapable of contracting, was competent and relevant, and it was error to exclude such offered evidence.

Other errors of law, occurring at the trial, are complained of in argument by appellant's counsel; but, as these errors will hardly occur again on a new trial of the cause, they need not be considered or decided.

The court erred in overruling appellant's motion for a new trial.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed Nov. 6. 1883.

No. 10,493.

## BURGETT ET AL. *v.* TEAL ET AL.

DEED.—*Fraud.*—*Rescission.*—*Tender of Repayment.*—*Complaint.*—A complaint to set aside a deed because of fraud, which fails to show an offer to put the grantee *in statu quo* by repayment of the purchase-money, is bad; nor is it sufficient to aver as an excuse that the defendant has concealed the amount in order to avoid a tender, without an offer to pay.

SUPREME COURT.—*Harmless Error.*—*Interrogatories to Jury.*—The general denial and special defences were pleaded, and it appeared by answers of the jury to interrogatories, that upon the trial there was an utter failure to prove the truth of the complaint, and that there was no motion for a new trial.

*Held*, that the Supreme Court could not reverse because of error in overruling demurrer to the special paragraphs of the answer, the errors being harmless.

From the Shelby Circuit Court.

*B. F. Davis, S. A. Forkner, E. P. Ferris, W. W. Spencer, J. S. Ferris, N. B. Berryman* and *G. Adams*, for appellants.

*T. B. Adams, L. T. Michener, B. F. Love, A. Major* and *H. C. Morrison*, for appellees.

BICKNELL, C. C.—Thomas Dixon and his second wife, by whom he had no children, conveyed 120 acres of land in Shelby county to William E. Teal, and in consideration thereof, and at the same time, Teal and wife conveyed to Dixon and wife a house and lot in Shelbyville, and Teal assumed the payment of three mortgages, which were liens on the 120 acres, and which together amounted to $2,550, besides interest and the costs of a suit pending on one of the mortgages.

These conveyances were made on March 1st, 1877, and each contained a stipulation that possession should not be given until March 1st, 1878. In August, 1878, Dixon died, leaving his said wife his survivor.

In December, 1880, the appellants, Dixon's children and grandchildren, brought this suit against Teal and Dixon's widow, the appellees.

The complaint was in four paragraphs, each of which stated the foregoing facts:

The first paragraph averred, also, that the 120 acres were worth $9,000, and that the Shelbyville lot was worth only $1,000, and that the only consideration of Dixon's conveyance was the conveyance to him and his wife by Teal and wife of the Shelbyville lot and the payment by Teal of $2,500 upon the mortgages aforesaid; that Dixon was "old, infirm, diseased, of feeble and unsound mind, and incapable of transacting any business," as defendants well knew; that Teal and Dixon's wife persuaded and induced him to execute his said conveyance; that plaintiffs, before suit brought, notified defendants that they disaffirmed the conveyances, and demanded a conveyance of the 120 acres.

Copies of the conveyances and notices were made parts of this paragraph; Dixon's deed states its consideration as $6,000; the consideration of Teal's deed is stated therein as $3,000. The notices were served November 3d, 1880. In the notice to Dixon's widow the plaintiffs "hereby demand a reconveyance of the Shelbyville lot by her to William E. Teal." In the notice to Teal the plaintiffs demand from him a conveyance of the 120 acres.

This paragraph shows no repayment to Teal of the $2,500 alleged to have been paid by him, and it shows no offer to put Teal *in statu quo* in any respect. This paragraph prays that said deeds so executed be set aside and declared void, and that plaintiffs' title be quieted.

The second paragraph alleges that Dixon was "infirm, old, diseased, weak in body and mind, and incapable of comprehending and transacting business affairs;" and that the defendants conspired together to cheat and defraud Dixon by representing to him that said 120 acres, which were in fact worth $9,000, were worth only $6,000; and that the Shelbyville lot, which was in fact worth only $1,000, was worth $3,000; that the consideration, "paid and assumed," for said 120 acres, was less than $3,700, the exact amount being unknown

to the plaintiffs; that said Teal has concealed said amount from the plaintiffs to prevent a tender thereof by them; that they are ready and willing to pay said amount when ascertained. This paragraph also alleges notices of disaffirmance. Its prayer is that the amount due Teal be ascertained, and that on payment thereof said deeds be set aside, etc.

The third paragraph alleges that Dixon was of unsound mind, and avers notice of disaffirmance, and that plaintiffs demanded a reconveyance of the 120 acres, and that the widow of Dixon refuses to join in this suit as plaintiff, and, therefore, is made a defendant. This paragraph prays that the conveyance of the 120 acres be set aside, and that plaintiffs' title thereto be quieted.

The fourth paragraph avers that Dixon was "old, infirm, of weak mind and frail body, and had been long troubled with epilepsy, and had suffered from a bruise on the head, and was ignorant of the value of property in Shelbyville; that Teal represented to him that the Shelbyville lot, together with the use of the 120 acres for a year, was worth as much as the 120 acres; that Dixon's wife assisted in perfecting the exchange and carrying out the fraud of Teal in order to become one of the grantees of the Shelbyville lot; that said representations induced Dixon to make the deed; that Dixon's disabilities were well known to Teal, who, therefore, urged and hastened the completion of the contract; that Dixon's widow still holds the Shelbyville lot; that the plaintiffs "are not able to tender back what Teal has paid." This paragraph also avers notice of disaffirmance, and that Dixon's widow refuses to join as plaintiff, and is, therefore, made a defendant.

This paragraph demands a rescission of the contract so far as the plaintiffs are concerned, and that if relief can not be granted on any other terms, an accounting may be had, and defendant Teal compensated for the encumbrances he has paid.

Demurrers by the defendant Teal were sustained as to all of these paragraphs except the third, to which his demurrer was overruled.

Demurrers by the defendant Dixon's widow to the entire complaint, and to its paragraphs separately, were sustained.

The defendant Teal answered the third paragraph of the complaint by a general denial and two special paragraphs.

The plaintiffs moved to strike out part of the second paragraph of said answer. This motion was overruled.

The plaintiffs demurred to each of the second and third paragraphs of said answer, and said demurrers were overruled.

The plaintiffs then filed a reply in denial of said special paragraphs of answer, and they filed a special reply to the second of said paragraphs.

The defendant Teal demurred to said special reply, and said demurrer was sustained.

The issues thus joined between the plaintiffs and the defendant Teal were tried by a jury, who returned a general verdict for the defendant, upon which the court rendered judgment.

The plaintiffs appealed, assigning thirteen errors, all of which relate exclusively to the rulings of the court upon the pleadings.

There was no error in sustaining the demurrers to the first paragraph of the complaint. It avers that the contract was procured by fraud and imposition upon a person of feeble intellect, and it appeals to the equitable powers of the court to rescind the contract and to set the conveyances aside, but it fails to state repayment, or an offer of repayment, to Teal of the money alleged to have been paid by him as a part of the consideration of Dixon's conveyance. This is a fatal defect. *Watson Coal and Mining Co.* v. *Casteel*, 68 Ind. 476; *Hanna* v. *Shields*, 34 Ind. 84; *Shaw* v. *Barnhart*, 17 Ind. 183; *Robards* v. *Marley*, 80 Ind. 185; *DeFord* v. *Urbain*, 48 Ind. 219.

There was no error in sustaining the demurrers to the second paragraph of the complaint. This paragraph also demands a rescission of the contract, and fails to state payment or an offer of payment of the consideration received for the alleged fraudulent conveyance. It presents, as an excuse for

such failure, the allegations that the plaintiff did not know the amount paid by Teal, and that Teal concealed the amount in order to prevent a tender thereof by the plaintiffs. This was not a sufficient excuse. If the plaintiffs did not know the amount of the incumbrances from which the property had been relieved, they might have learned it by inquiry of the holders of the mortgages, if not from the records. It was not possible for Teal to conceal from the plaintiffs the amount paid by him on the mortgages. A contract can not be affirmed in part so as to hold the price, and disaffirmed in part so as to avoid the conveyance.

There was no error in sustaining the demurrers to the fourth paragraph of the complaint. This paragraph was bad for the same reasons heretofore stated in reference to the first and second paragraphs. It merely alleges that the "plaintiffs are not able to tender back what Teal has paid," and that Mrs. Dixon refuses to join as plaintiff, and therefore is made a defendant. There is no cause of action stated in this paragraph as to either of the defendants.

The third paragraph of the complaint was held sufficient. There was no available error upon the ruling of the court in refusing to strike out parts of the second paragraph of the answer of the defendant Teal. *Morris* v. *Stern*, 80 Ind. 227; *Hewitt* v. *Powers*, 84 Ind. 295.

The third paragraph of the complaint, upon which, with the answers and replies thereto, the cause was submitted to the jury, stated, as the sole ground of the relief claimed, that Dixon, the ancestor of the plaintiffs, was of unsound mind when he made the conveyance sought to be set aside, and that the plaintiffs had given due notice of their disaffirmance of the contract.

One of the answers of the defendant was the general denial. Therefore, if the plaintiffs failed to prove such unsoundness of mind, they had no cause of action. With their general verdict for the defendant, the jury answered interrogatories, as follows:

"1. Was Thomas Dixon, at the time of executing the deed to William E. Teal, of sufficient mental capacity to understand the nature, effect and consequence of executing the same? Answer. Yes.

"2. Did the plaintiffs, before the commencement of this suit, give the defendant Teal notice that they disaffirmed that part of the contract contained in the deed of Teal and wife to Thomas and Miranda Dixon? Answer. No.

"3. Did the plaintiffs, before the commencement of this suit, give the defendant Teal notice that they disaffirmed that part of the contract contained in the deed of Thomas Dixon and wife to Teal? Answer. Yes.

"4. Were the deeds from Teal and wife to Dixon and wife, and from Dixon and wife to Teal, concurrent acts and made in execution of the same contract? Answer. Yes.

"5. Was Thomas Dixon a person of unsound mind at the date of the deed to William E. Teal? Answer. No."

It appears by these special findings that Dixon, at the date of the deed sought to be set aside, was not a person of unsound mind.

No objection was made to the verdict nor to the special findings; therefore the rulings upon the demurrers to the special defences and to the replies, even if erroneous, would not warrant the reversal of the judgment. The matters therein averred could become material, only in case the unsoundness of mind, alleged in the third paragraph of the complaint, should be proved. It makes no difference what would or would not be a defence to an allegation of unsoundness of mind, if, as the verdict and special findings show, there was no unsoundness of mind in the present case.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Nov. 3, 1883.

No. 11,111.

## CRAWFORD ET UX. *v.* THOMPSON.

WILL.—*Construction.*—*Husband and Wife.*—*Parties.*—*Marriage, Condition in Restraint of.*—*Gift.*—A testator devised lands to his widow, gave certain legacies, and then to his widow his personal property, "on condition that she pay $50 per year to my daughter, Martha Fox," and if Martha should marry a second time, then "she shall not be entitled to said legacy from that time on," and "when said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more, and the balance shall be retained by my said wife." Martha became a widow and married again; the widow of the testator also married, and the former sued the latter, holding the property given her by said will, and her husband, to recover an instalment, accruing after Martha's second marriage. All this, and that three-fourths of the fund had not been received by the plaintiff, appeared by the complaint.

*Held*, that the husband of the principal defendant was a proper party by reason of section 5127, R. S. 1881, and the complaint as against him was good on demurrer.

*Held*, also, that the widow did not take the personal property upon a condition subsequent, but a gift to Martha was intended to be paid through her mother as trustee.

*Held*, also, that the condition subsequent annexed to the gift to Martha was unreasonable, being an absolute prohibition of a second marriage, and was void, and the plaintiff was entitled to recover.

From the Montgomery Circuit Court.

*G. W. Paul* and *J. E. Humphries*, for appellants.

*G. W. Strafford* and *W. W. Thornton*, for appellee.

BLACK, C.—The following facts were shown, in substance, by the complaint in an action brought by the appellee against the appellants: Burr Quick died testate, in Montgomery county, in January, 1880. By the first item of his will he gave to his wife Elizabeth Quick, in lieu of her interest in his lands, certain real estate in said county. By the second item he devised certain other land to his daughter Cora. By the third, fourth and fifth items, he gave general legacies of money to his three sons. The sixth item was as follows:

"After the payment of my just debts and the above legacies, I give and bequeath all my personal property, including

money, notes, accounts and all other personalty, to my said wife Elizabeth Quick; that I devise said personalty to her on the condition that she pay one hundred dollars per year to my daughter Martha Fox, as long as my said daughter shall live, provided that said money is to be paid to her only on the following conditions: First. That my said daughter shall not live with, or in any manner recognize, Asa Fox as her husband. Second. In case she, said Martha Fox, should live with him, said Fox, or recognize him as her husband, she shall not have the benefit of the above legacy during that time, but the same shall belong to my said wife. Third. However, in case said Martha should obtain a divorce from said Fox, or he should die, or she should abandon him after living with him, if she should so live with him again, then the right to said legacy shall revive, and she shall be entitled to the same from that time on until her death. Fourth. If said Martha shall remarry, she shall not be entitled to said legacy from that time on. Fifth. When said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more under said will, and the balance shall be retained by my said wife."

These were all the disposing provisions of the will. By a codicil, the testator changed the will as follows: "Instead of one hundred dollars per year, which said will specifies shall be paid by my said wife to my said daughter Martha Fox, as mentioned in item sixth therein, the same is changed to fifty dollars per year; and in no other respect is any change to be made in said will."

The will, with its codicil, was probated on the 31st of January, 1880, and the testator's widow, said Elizabeth, was appointed administratrix with the will annexed, on the 6th of February, 1880, and entered upon the discharge of her trust, and took possession of all the real estate devised to her by said will, and has ever since held possession of the same and enjoyed the benefits thereof. She also took possession of and retained all the personal property left by the testator.

And the account in final settlement of said estate was filed and approved by the court on the 30th of September, 1881, and said Elizabeth received and receipted to the court for all the personal property remaining after the payment of all the just debts and the legacies, according to the conditions of the will. She thus received, after the settlement of the estate and the payment of debts and legacies and costs of administration, personal property to an amount stated in the complaint to be $3,000; on the trial the amount was shown to be $1,245.93 in value.

Said Asa Fox, husband of said Martha, died in the year 1880, and on the 30th of November, 1882, she married one Stidman Thompson, who is still her husband, living with her as such. She is the appellee.

Said Elizabeth paid said annuity of $50 for two years, up to the 6th of February, 1882; and on the 6th of February, 1883, and afterwards, before the commencement of this suit, said Martha demanded payment of the annuity for the year ending February 6th, 1883. Said Elizabeth said she was willing to pay a proportionate part for the portion of the year up to the time of said Martha's marriage, that is, from February 6th, 1882, to October 30th, 1882, but claimed that the legacy ceased with and was defeated by Martha's marriage. Martha refused to receive less than $50.

Said Elizabeth was married October 4th, 1882, to Jesse H. Crawford, and she and her said husband are the appellants.

The appellee sought by her suit to recover the amount of said annual instalment of her legacy for the year ending February 6th, 1883, and interest thereon from that date.

The defendants severally demurred to the complaint, for want of sufficient facts. The demurrer was overruled, and the defendants answered by general denial. The cause was tried by the court. The finding was for the plaintiff, the amount of the recovery being $51.20. A motion for a new trial made by the defendants was overruled, and judgment was rendered on the finding.

The appellants jointly, and the appellant Jesse H. Crawford separately, have assigned as errors the overruling of the demurrer to the complaint and the overruling of the motion for a new trial.

The only question discussed by counsel concerning the complaint relates to its sufficiency as against the appellant Jesse H. Crawford. The question is whether, as the complaint did not otherwise show a reason for making said Jesse a defendant, the fact that he was the husband of his co-defendant, against whom a cause of action was shown, was a sufficient reason for joining him as a defendant.

The code of 1852 (section 8) provided: "When a married woman is a party, her husband must be joined with her; except: *First.* When the action concerns her separate property she may sue alone. *Second.* When the action is between herself and her husband, she may sue or be sued alone; but in no case shall she be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years."

The act of March 25th, 1879 (Acts 1879, p. 160), while it greatly extended the powers of married women, and provided that a married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character, the same as if she were *sole*, did not repeal or modify the requirement of section 8 of the code of 1852, that her husband must be joined with her when made a party defendant.

Section 11 of the code of 1881, being section 254, R. S. 1881, substituted for said section 8 of the code of 1852, provides, simply, that "A married woman may sue alone—*First.* When the action concerns her separate property. *Second.* When the action is between herself and her husband; but in no case shall she be required to sue or defend by a guardian or next friend, except she be under the age of twenty-one years."

We presume that it is because of this modification of the statute that counsel for appellants suppose that said Jesse was not a proper party. What effect recent legislation has upon

the former practice of making the husband a defendant in actions against his wife, must be left for discussion in cases requiring it. The case at bar is otherwise controlled. This is a suit upon a liability of the wife contracted *dum sola*. At common law, in such an action, though satisfaction of the judgment was to be made out of the husband's property, the action was brought against both. 1 Chit. Pl. 57; *Platner* v. *Patchin*, 19 Wis. 333.

In 1852 a statute was enacted, 1 R. S. 1876, p. 550, the third section of which is still in force, being section 5127, R. S. 1881, and is as follows: "When any woman against whom any liability exists shall marry, and has or acquires lands, judgment on such liability may be rendered against her and her husband jointly, to be levied of such lands only."

Of course, in such case, both are proper parties defendants. The complaint showed that under the will the female defendant acquired lands which she still has. It is not sought by assignment of error to present any question as to the form of the judgment, and such question could not be successfully presented here, as it was not raised in any manner below.

The only other question to be decided is, whether the amount of the finding was too large, that is, whether the appellee was entitled to recover the whole amount of the annual instalment of the legacy or only a portion thereof, proportionate to the part of the year which expired before her remarriage. The parties had agreed upon the 6th of February as the date of the yearly payments, and former payments had been made accordingly. If the legacy should continue, notwithstanding the appellee's second marriage, she was entitled to interest from the 6th of February, 1883, and in that event the amount recovered was not too large. The appellee insists, and the court below held, that the condition annexed to the gift to the testator's daughter Martha was void as being in restraint of marriage.

It is contended on behalf of the appellants, that there was no gift to Martha Fox, but that there was a gift to Elizabeth

Quick on condition; that there was no condition except one applying to said Elizabeth, which was that she should pay Martha fifty dollars a year until she should marry.

In the sixth item the testator first used language importing a gift of the residue of the personal estate to his wife. He then said that he gave her said residuum on the condition that she pay a certain sum to his daughter Martha as long as she should live. He then provided that said money should be paid to the daughter only on certain conditions. He provided that it should be paid to her only on condition that she should not live with or recognize Asa Fox as her husband. He provided that the daughter should "not have the benefit of the above *legacy* during" the time she should live with her husband, Asa Fox. He provided that in certain events "the *right* to said legacy shall revive, and she shall be *entitled* to the same from that time on until her death." He provided that if she should remarry she should "not be *entitled* to said legacy from that time on." He provided, finally, that when the daughter should have received "an amount *out of said personalty* equal to three-fourths thereof," she should "not be entitled to any more under said will, and the balance shall be retained by my said wife."

The money to be paid to the daughter is spoken of as a legacy to which she should have a right, and to which she should be entitled, and it was payable out of said personalty; and, in any event, at least one-fourth of the personalty was to be retained by the wife.

We must take the intention of the testator from the whole clause. Was this a gift to the widow of the testator on condition? Conditions are either precedent or subsequent. If it was a gift to Elizabeth on condition, the condition was subsequent, and the continued existence of the legacy to Elizabeth depended upon the happening or not happening of an uncertain event, by which it might be defeated; that is, the gift to Elizabeth was subject to be divested by the non-performance or breach of the condition; in other words, the

failure of Elizabeth to perform the condition, if there was a conditional gift to her, would work a forfeiture, and the whole surplus of the personalty would be recoverable from her by the personal representative of the testator.

Where the language of a will and the intention of the testator admit it, bequests expressed to be "on condition" subsequent are, in modern times, to be considered as imposing a trust, and not as conditions which shall take the property out of the legatee if he does not comply with them. Williams Ex. 1260.

We do not think it was the intention of the testator to make a condition, the breach of which by Elizabeth would work a forfeiture of the residue of the personalty.

If there was here a clear gift to the wife there was as clear a gift of a part of the amount, through the wife, to the daughter. The will gave the daughter a vested interest, though the fund out of which it was to be paid was given to another. The widow was given one-fourth of the residue at all events, and she was created a trustee without discretion as to three-fourths thereof. The most favorable view for the testator's widow is that she was made a residuary legatee, with an express direction to pay out of the residuum a legacy to the daughter. This would make her a trustee for the latter legacy. The gift to the daughter is contained in the bequest to the wife. It is not payable to the daughter, at all events, or out of land, or out of the estate of the testator generally, but is payable out of a fund which might be greater or less, and only to the extent of three-fourths of that fund. The amount of the gift to the daughter depends on the amount of the residue of personalty. When the widow had, as executor, finally settled the estate, her relation as executor to this fund ceased, and she became a trustee for the daughter's legacy. The estate is not chargeable with the legacy to the daughter. To say that the widow held the residue upon condition, subject to forfeiture, would, in the event of a breach of condition, send the fund back into the estate,

and deprive the widow of the one-fourth given her absolutely, and deprive the daughter of her legacy. The wife, we think, was made chargeable with the legacy as a trustee. The trustee is personally liable for the payment of the legacy. A gift in trust upon the condition that the beneficiary shall not marry at all, will vest in the donee, and the condition is void. Perry Trusts, section 515.

The law upon the subject of conditions in restraint of marriage is a combination of the common law and the civil law as introduced by the ecclesiastical courts and construed and adopted with some subtile distinctions by courts of equity.

Conditions annexed to gifts, legacies and devises in restraint of marriage generally and absolutely, and those which are unreasonable because the donor has no right to control as to the donee's marriage, or exceeds his right, or so exercises it that it will probably operate as a general prohibition, are void, except a condition precedent annexed to a devise of land, which though it be in complete restraint will, if broken, prevent the taking effect of the devise. But conditions which annex a partial, just and reasonable restraint, considered with regard to the relation of the parties and the character of the restraint, not operating unduly, under the circumstances, upon the freedom of marriage, are not void.

It is plain that under such a rule and exception the question must depend, to a great extent, upon the circumstances of particular cases.

Among the distinctions established by the authorities are the following:

"When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* merely, and is inoperative." Pom. Eq. Jur., section 933, and authorities there cited.

It appears to be settled by the authorities, English and American, that in the absence of statutory provision on the subject, not only limitations but also conditions, whether precedent or subsequent, annexed to devises and legacies, restraining the testator's widow from marrying, are valid and operative. A condition subsequent, annexed to an annuity, in restraint of the marriage of the testator's widow, where there was no limitation over, has been held to be *in terrorem* merely and void. *Parsons* v. *Winslow*, 6 Mass. 169; S. C., 4 Am. Dec. 107.

The condition in restraint of the marriage of the testator's widow is treated as a condition annexing reasonable restraint, made by one having such a relation to the donee as authorizes him to take such an interest and assume such a control in regard to her marriage. Whether the cases which uphold such conditions are founded upon sound reason might, perhaps, be questionable, if the subject were original, especially where there are no children who are proper objects of the testator's bounty and protection. But the authorities have put the matter beyond question.

In this State we have a statute concerning a condition in restraint of the marriage of the widow of a testator, as follows: "A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void." 2 R. S. 1852, p. 308; section 2567, R. S. 1881.

This statute operates to render void at least such conditions as are in general restraint of the marriage of the testator's widow. *Stilwell* v. *Knapper*, 69 Ind. 558 (35 Am. R. 240). In that case it was said of this statute: "We deem it unnecessary to determine whether our statute has done anything more than to place the widow of the testator upon a common level with other persons, in respect to restraints upon marriage; in other words, whether such reasonable restraints as would be upheld in regard to other persons may not be upheld in regard to such widows, under the statute above quoted. The statute may be construed to prohibit all restraints whatever upon

marriage, or only such general restraint as could not be imposed upon others."

In the case now before us, the testator, after assuming a control in regard to the then existing marriage of his daughter, concerning the validity of which we are not called upon to decide, annexed to the gift to her of a legacy, payable in small annual instalments, a condition subsequent in absolute restraint of her remarriage.

If this should be regarded as a partial and reasonable restraint, which the testator had a right to impose, then, as the condition was subsequent and annexed to a gift of personalty, the question as to its validity would depend on the decision whether or not there was a gift over.

Shall a subsequent condition, annexed by a testator to a legacy to his daughter, in absolute restraint of her second marriage, be treated as a reasonable restraint in this State?

In *Newton* v. *Marsden*, 2 J. & H. 356, decided in 1862, William Frost, by his will, declared certain trusts for the benefit of Caroline Derbyshire, widow of John Derbyshire, the testator's deceased nephew, and her children, under which the widow was entitled to certain rents of real estate and to annuities charged primarily on real estate, and to be made up, if necessary, out of personal estate, with a condition subsequent, that the trusts for the benefit of the widow should cease if she married. It was held that the condition was valid.

The learned Vice Chancellor, upon an examination of the authorities, could not find anything in the shape of an opinion of a clear and definite kind. He concluded that, upon the whole, the dicta were against extending the rule, that you can not impose a condition in restraint of marriage, to a restraint on the marriage of a widow. Admitting that the general expressions in which widowhood was spoken of as constituting an exception to the rule were open to the suggestion that they must be considered as pointed at the case of a gift to the donor's widow, and also to the observation that they were extra-judicial, he based his decision upon the ground

that there was no authority in the common law, independently of the civil law, for saying that a condition restraining the marriage of a widow is void.

In *Allen* v. *Jackson*, L. R. 1 Ch. Div. 399, decided in 1875, reversing the decision of HALL, V. C., it was held, that a condition in restraint of a second marriage, whether of a man or a woman, is not void. There, a testatrix gave the income of certain property to her niece (who was her adopted daughter) and the husband of the niece, during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived and married again. It was held that the proviso was valid and that the gift over took effect. *Newton* v. *Marsden*, *supra*, was spoken of by MELLISH, L. J., as a bolder decision, and it was said by him, that not to apply the same rule to a man as to a woman would be to overrule that case. BAGGALLAY, J. A., said that "the present state of the law as regards conditions in restraint of the second marriage of a woman is this, that they are exceptions to the general rule that conditions in restraint of marriage are void, and that the enunciation of that law has been gradual. In the first instance it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making a will in favor of his mother. * * * Then came the case, before Vice Chancellor WOOD of *Newton* v. *Marsden*, in which it was held to be a general exception by whomsoever the bequest may have been made."

Thus it is seen that the exception applicable to such a case as the one at bar, has in England followed or been recently built upon an exception which many years ago was abolished by the statute of this State. There is with us much greater freedom of absolute divorce than in England. We have need of increase of population. Besides, public morality and general prosperity are everywhere promoted by freedom of

marriage, and we are not bound by precedent to declare a rule which would restrict such freedom.

If we were disposed to hold that the condition in question imposed a reasonable restraint, there was no gift over, within the meaning of the authorities.

The exception that the condition shall be effectual if the subject of the bequest be given over so as to create an interest in another person is restrained and limited, and, to give it effect, the giving over to a third person must be an express giving over of the particular legacy, unincorporated with any other subject. A bare gift of the residuum, or merely leaving the legacy without any direction to fall into the surplus, will not be a sufficient giving over. *Parsons* v. *Winslow, supra,* and authorities there cited. Here all the personal estate of the testator remaining after the payment of debts and legacies was given to the appellant Elizabeth. The annuity to the appellee was made payable "out of said personalty" during her life or until she shall have received an amount equal to three-fourths thereof, and it was directed that the balance "shall be retained by" said Elizabeth. It was also directed that during the time that the appellee might live with said Fox, the legacy should belong to said Elizabeth. But no express disposition of the legacy "unincorporated with any other subject" was made to take effect when she should remarry. It was simply provided that if she should remarry she should "not be entitled to said legacy from that time on."

If, therefore, the condition in question should be regarded as annexing a partial and reasonable restraint upon marriage, it would be void for want of a gift over.

But we regard the condition as void, because it is an absolute prohibition of a second marriage.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed Nov. 3, 1883.

No. 10,781.

91 278
130 499

## HERRON ET AL. *v.* HERRON.

MORTGAGE.—*Equity.*—*Foreclosure.*—A deed, in form absolute, if intended to be a mere security, is in equity a mortgage, and a suit to foreclose may be maintained upon it.

MISJOINDER.—*Error.*—By express statute, R. S. 1881, section 341, a misjoinder of causes of action can never be available error on appeal.

BILL OF EXCEPTIONS.—*Practice.*—*Record.*—Motions to strike out pleadings and to separate causes of action, and the rulings thereon, are brought upon the record only by bill of exceptions or special order of the court.

MARRIED WOMAN.—*Mortgage.*—*Consideration.*—*Husband's Debts.*—*Foreclosure.*—That a wife, prior to 1879, mortgaged her lands without other consideration than to secure her husband's debt, is no defence to a suit against her to foreclose the mortgage.

From the White Circuit Court.

*J. H. Wallace* and *W. J. Gridley*, for appellants.

*J. Applegate* and *C. R. Pollard*, for appellee.

FRANKLIN, C.—Appellee filed a complaint in two paragraphs against appellants. The first was for the possession of a town lot in Monticello, White county, Indiana. The second was upon a deed executed in November, 1878, by appellants to appellee as a mortgage upon the lot, and asking a foreclosure of the mortgage.

The appellants demurred to each paragraph of the complaint, which demurrer was overruled.

The defendants then answered separately and jointly. A demurrer was sustained to the separate answer of Mary E. Herron, and a reply in denial was filed to the other answers. There was a trial by jury, and a verdict for the defendants on the issues in the first paragraph of the complaint, and for the plaintiff on the second paragraph of the complaint, finding the amount due the plaintiff, and for a foreclosure of the mortgage to pay it.

The defendants moved for a new trial and in arrest of judgment, both of which motions were overruled. The rulings upon the motions and demurrers have been assigned as errors.

The language of the demurrer to the complaint is: "The

defendants herein demur separately to each paragraph of the complaint, for the reason the same does not state facts sufficient to constitute a cause of action against the defendants."

Counsel for appellee insist that this is a joint and not a several demurrer to each paragraph of the complaint.

The first paragraph is admitted to be good; but counsel for appellant insist that the demurrer is several, and the second paragraph of the complaint ought to be held bad, for the reason that the instrument declared on as a mortgage is a deed, and no action will lie upon it as a mortgage.

A deed, though absolute upon its face, may be only a mortgage, and may be declared on as such. *Graham* v. *Graham*, 55 Ind. 23. So that it makes no difference whether the demurrer was joint or several; both paragraphs of the complaint were good. If appellants desired the second paragraph made more specific, their remedy was by motion and not by demurrer. *Sibbitt* v. *Stryker*, 62 Ind. 41.

Appellants also filed what they call a special demurrer to the complaint for a misjoinder of causes of action. Whether this demurrer be general or special, no judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action. Code of 1881, section 341; *Coan* v. *Grimes*, 63 Ind. 21. There is no error in overruling the demurrers to the complaint.

The second specification of error is for overruling a motion to strike out the second paragraph of the complaint; and the third is for overruling a motion to separate the causes of action in the complaint. Whether these rulings were erroneous or not can not be enquired into. There is nothing to show that appellants excepted to these rulings. There is no bill of exceptions in the record. Such motions and rulings upon them can only be put into the record by bill of exceptions or special order of the court. *Greensburgh, etc., Turnpike Co.* v. *Sidener*, 40 Ind. 424.

The reasons stated for a new trial are, that the verdict was contrary to law and not supported by sufficient evidence, and

the rulings upon the demurrers to the complaint and answer. Rulings upon demurrers are not proper reasons for a new trial. The other reasons are dependent upon the evidence, and the evidence is not in the record; therefore no question is properly presented to us in relation to the motion for a new trial.

The motion in arrest of judgment was properly overruled, for the reason heretofore stated in relation to the rulings upon the demurrer to the complaint.

A seventh specification has been added to the assignment of errors, that the court erred in sustaining the demurrer to the separate answer of Mary E. Herron.

The facts that the deed was a mortgage, that she was a married woman and the mortgaged property belonged to her, that it was to secure her husband's debt, and that no consideration passed to her, that she was ignorant of the law, and had been misinformed as to her legal rights, constituted no defence to a foreclosure of the mortgage. There was no error in sustaining the demurrer to this answer. We find no available error in this record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Nov. 7, 1883.

---

91 280
134 348

91 280
139 291

91 280
142 445

91 280
161 295
162 655

No. 10,136.

## CITIZENS STATE BANK OF NEWCASTLE *v.* ADAMS.

PROMISSORY NOTE.—*Indorsement.—Assignor and Assignee.—Forgery.—Notice.*—A forged assignment of a promissory note by the payee gives no right to a subsequent assignee as against the payee, though he be a *bona fide* holder for value.

PLEADING.—*Evidence.—Insolvency.—Decree.—Vendor's Lien.*—A vendor's lien may be established without averment or proof of the vendee's insolvency, but the decree can only be for the sale of the land after exhausting other property of the vendee.

Citizens State Bank of Newcastle *v.* Adams.

SAME.—*Cross Complaint.—Mortgage.—Judgment.—Witness.—Evidence.—Promissory Note.*—Suit on a note and mortgage against the maker and several endorsers, including the payee, judgment by default and foreclosure against all, but the payee, having afterwards got the default set aside, pleaded that she had sold the land to the maker, taking for the purchase-money other notes without security, and that the note and mortgage sued on were never executed to her, and that her assignment was a forgery. She also filed a cross complaint averring the same facts, that the notes taken by her for purchase-money were unpaid, that the maker was insolvent and had no property save the land, and praying that a vendor's lien be declared in her favor, having priority over the plaintiff's judgment; copies of the notes taken were not filed, and the original plaintiff only was made defendant.

*Held*, that the answer was good on demurrer.

*Held*, also, that the cross complaint was good against a demurrer for want of sufficient facts.

*Held*, also, that the defendant was a competent witness for herself.

*Held*, also, that the notes described in the cross complaint were proper evidence for the defendant.

SUPREME COURT.—*Amendments.—Discretion.*—The refusal of the court to permit amendment of pleadings after issues have been formed will not be reviewed by the Supreme Court, save when it appears that there has been an abuse of discretion.

EVIDENCE.—*Judge's Notes.*—The judge's notes of evidence are not ordinarily admissible as evidence in the trial of another issue.

SAME.—*Harmless Error.*—The admission of improper evidence which tends only to prove a fact which is fully established by all the other evidence, is a harmless error.

From the Henry Circuit Court.

*M. E. Forkner, J. M. Morris* and *C. H. Burchenal*, for appellant.

*J. H. Mellett* and *E. H. Bundy*, for appellee.

BICKNELL, C. C.—This was a suit upon a note and mortgage made by Ira B. Adams to Lydia Adams, which, it was alleged, after several assignments, became the property of the appellant, who brought the suit against the maker and the alleged assignors.

The appellant obtained a judgment by default against all the defendants.

The appellee filed a complaint praying that the judgment

and the sale thereon made be set aside, and that she be permitted to appear and defend. A demurrer to this complaint having been sustained, an appeal from the judgment thereon was taken to this court, where the complaint was held sufficient, the judgment upon the demurrer was reversed, and the cause remanded for further proceedings, the result being that the default and judgment in the original suit were set aside as to the appellee. The appellant moved for a new trial of the question as to setting aside the default. This motion was overruled, and the appellee then answered the original complaint and filed a duly verified cross complaint.

Her answer was in two paragraphs, to wit: 1st. The general denial. 2d. That on May 1st, 1875, she sold the land described in the mortgage to Ira B. Adams for $4,000, secured by his two notes for $2,000 each, which she still holds, and which are due and unpaid; that on May 4th, 1875, said Ira B. Adams made the note and mortgage described in the appellant's complaint, but never delivered either of them to her; that she never knew of their existence until after the commencement of this suit; that she never endorsed the same, nor authorized any one to do so.

The cross complaint states in substance the same facts, and that Ira B. Adams is insolvent, and has no property subject to execution except said mortgaged land, and prays that the amount due the appellee be declared a lien upon said land, superior to the lien of said mortgage, and that upon a sale she be first paid out of the proceeds.

Demurrers to the second paragraph of said answer and to said cross complaint were overruled.

The appellant replied in denial and answered the cross complaint by a denial.

The issues were submitted to the court for trial, and, without objection, the following questions of fact were submitted to a jury for the information of the court, to wit:

1. Were the note and mortgage in controversy made by Ira B. Adams to Lydia Adams with her knowledge or consent?

2. Were the note and mortgage, or either of them, made by Ira B. Adams to Lydia Adams with her knowledge or consent?

3. Did Lydia Adams have any knowledge of the existence of the said note and mortgage or either of them?

4. Were the said note and mortgage, or either of them, delivered to Lydia Adams, or any other person by her authority?

5. Did Lydia Adams endorse said note by making her mark where her name is written on the back of said note?

6. Did Lydia Adams endorse said mortgage by making her mark where her name is written on the back of said mortgage?

To each of these questions the jury answered "No."

The court found for said Lydia Adams upon the complaint and cross complaint, in the sum of $6,548, and rendered a judgment that she had a vendor's lien therefor on the said land, superior to any lien of the appellant, and that said land be sold to pay said lien of said Lydia Adams, after first exhausting the personal property of said Ira B. Adams, if any there be, etc.

The appellant moved for a new trial; this motion was overruled, and the present appeal was taken.

The following are the errors assigned:

1. The court erred in finding for and rendering judgment in favor of Lydia Adams upon the complaint and motion to set aside the default taken against her in said cause.

2. The court erred in overruling the appellant's motion for a new trial of the issue formed upon said complaint to set aside said default.

3. The court erred in rendering judgment upon its finding on said issue.

4. Error in overruling the appellant's demurrer to the second paragraph of the appellee's answer to the original complaint.

5. The court erred in overruling the appellant's demurrer to the appellee's cross complaint.

6. The cross complaint does not state facts sufficient to constitute a cause of action.

7. The court erred in overruling the plaintiff's motion for a new trial.

The first and third of these alleged errors present no question for consideration. *Smith* v. *Ryan*, 83 Ind. 152; *Blizzard* v. *Riley*, 83 Ind. 300.

As to the second alleged error, the reasons assigned for a new trial of the issue joined upon the complaint to set aside the default are, that the finding thereon was not sustained by sufficient evidence, is contrary to the evidence, and is contrary to law.

When this case was here before, the complaint to set aside the default was held to be sufficient. *Adams* v. *Citizens State Bank*, 70 Ind. 89. Therefore, the only question arising upon this motion for a new trial is, was there evidence tending to sustain the allegations of the complaint to set aside the default?

The substance of the complaint is thus stated by WORDEN, J., in giving the opinion of the court in the case last above cited: "The plaintiff was an elderly woman, 67 years of age, and it may be assumed that she had but little knowledge of the world or its ways and business, as she could neither read nor write. She did not understand the summons, when it was read to her, or know what it meant, but she thought and understood that the suit was to be at the court-house at Indianapolis, and she was led to believe it was a matter in which she had no interest. Common justice," says the judge, "requires that the plaintiff, under the facts stated in the complaint, should be relieved of the default and judgment against her." We think the finding of the court was right, and that there was no error in overruling the motion for a new trial of the issue now under consideration.

As to the fourth alleged error, this court in its former opinion, already referred to, said: "It is abundantly clear that the defendant could acquire no title to the note and mortgage as against the plaintiff, by means of the forged endorse-

ments, nor could it thus acquire any right as against the plaintiff to enforce the mortgage against the land, and thereby interfere with the lien of the plaintiff as a vendor. As to rights of parties to forged paper, see Edwards Bills, 190; *Allen* v. *Sharpe*, 37 Ind. 67; *Huston* v. *Roosa*, 43 Ind. 517; *Huston* v. *Schindler*, 46 Ind. 38."

The appellant, in its complaint, claimed title under the forged endorsements; the forged endorsements passed no right as against the appellee, even to a *bona fide* holder for value. *Esdaile* v. *LaNauze*, 1 Younge & Collier, 394; *Johnson* v. *Windle*, 3 Scott, 608. There was no error in overruling the demurrer to the second paragraph of the appellee's answer.

The fifth and sixth errors question the sufficiency of the cross complaint.

The appellant, in its brief, claims that the cross complaint was insufficient, because Ira B. Adams was not made a party to it. There was no demurrer for defect of parties. Defect of parties may be tested either by demurrer or by answer. Failing to take advantage of it in either way was a waiver of such defect, if any. *Womack* v. *McAhren*, 9 Ind. 6; *Collins* v. *Nave*, 9 Ind. 209; *Johnson* v. *Britton*, 23 Ind. 105; *Wright* v. *Jordan*, 71 Ind. 1.

The principal objection urged against the cross complaint is, that it contains "no averment that the appellant, at or before the time of receiving the mortgage in suit, had notice that the appellee's purchase-money was unpaid, or that appellant was not a *bona fide* holder for value."

This objection is sufficiently answered by what has been said in reference to the fourth alleged error; the appellant, claiming title under a forged endorsement of the note and mortgage, was not a *bona fide* holder as against the appellee whose name was forged.

It is also objected to the cross complaint, that although it states that copies of the notes, taken by appellee on account of the purchase-money of the land, are annexed thereto, yet in fact no copies were so annexed.

The omission to file such copies of written instruments which are the cause of action, is good ground of demurrer for insufficiency, and the mere statement that such copies are filed is not enough. *Ohio, etc., R. R. Co.* v. *Nickless*, 71 Ind. 271; *Cook* v. *Hopkins*, 66 Ind. 208. But in this case the cross complaint was seeking to enforce a vendor's lien, and it was not necessary to file copies of the notes.

There was no error in overruling the demurrer to the cross complaint.

As to the seventh alleged error, there were thirteen reasons given for a new trial, to wit:

1. That the court erred in setting aside the default of the appellee.

2. That the court erred in refusing to permit the appellant to amend its demurrer to the cross complaint, by adding, as an additional ground of demurrer, that there was a defect of parties defendants.

The third, fourth and fifth reasons are not alluded to in the appellant's brief, and are regarded as waived.

6. The court erred in excluding from the jury the appellee's testimony, as written down by the judge of the court at the hearing of the appellee's complaint to set aside the default.

7. The court erred in permitting the appellee to testify as a witness in her own behalf.

8. The court erred in refusing to strike out and withdraw from the jury a part of the testimony of Henry Adams.

The ninth and tenth reasons are not discussed in the appellant's brief, and are regarded as waived.

11. The court erred in admitting in evidence, over appellant's objection, two promissory notes, dated May 1st, 1875, purporting to be signed by I. B. Adams, and alleged to have been given to appellee by said Ira B. Adams for the purchase-money of the real estate in controversy.

12 and 13. That the finding of the court is not sustained by sufficient evidence and is contrary to law.

As to the first of these reasons, we have already seen that the default was rightly set aside.

As to the second reason, the bill of exceptions shows that, after a reply in denial of the second paragraph of the answer, and after an answer in denial of the cross complaint, whereby the issues were joined, but before the jury was sworn, the appellant moved the court for leave to amend its demurrer to the appellee's cross complaint, by inserting as an additional ground of demurrer, that there was a defect of parties defendants, in that said cross complaint did not make Ira B. Adams, or the heirs or representatives of Ira B. Adams, deceased, parties defendants. The overruling of this motion is complained of.

In *Chapin* v. *Board, etc.*, 21 Ind. 12, this court held it was not error, after one demurrer had been overruled, to refuse to permit another demurrer to be filed to the same complaint. The court said: "Whether in any instance, a court has the discretionary power to permit a second issue of law to be made on the same pleading or not, a case is certainly not shown where such discretion, if it exists, has been abused." So, in *Thornton* v. *Williams*, 14 Ind. 518, it was held that where the defendant, after a new trial granted, asked leave to demur to a reply, this was matter in the discretion of the court. In *Voltz* v. *Newbert*, 17 Ind. 187, it was held that amendments, after issue joined, are within the discretion of the court, and that this court will not interfere unless it appears that the discretion has been abused. In *Burr* v. *Mendenhall*, 49 Ind. 496, this court held that where an application is made for leave to amend, after issue joined, and is overruled, this court will, in the absence of a showing that there has been an abuse of discretion, presume that the action of the court was correct. There was no such showing here.

As to the sixth reason for a new trial, there was no error in refusing to permit the appellant to read to the jury the defendant's testimony, as written down by the judge, at the hearing of the complaint to set aside the default.

As to the seventh reason for a new trial, there was no error in permitting the appellee to testify as a witness in her own behalf.

As to the eighth reason, there was no available error in refusing to strike out the statement of Henry Adams, that his mother told him the two notes offered in evidence were the notes given by Ira B. Adams for the land in controversy, because without that statement the notes were fully identified by the other evidence.

As to the eleventh reason for a new trial, there was no error in admitting in evidence the two notes given by Ira B. Adams for the land in controversy.

As to the twelfth and thirteenth reasons for a new trial, we think the finding was sustained by the evidence and was not contrary to law. It has been often held that a vendor does not waive his lien for the purchase-money of land, by taking the vendee's note therefor without security. He does not waive his lien even by obtaining judgment upon such a note. *Aldridge* v. *Dunn*, 7 Blackf. 249 (41 Am. Dec. 224); *Crowfoot* v. *Zink*, 30 Ind. 446.

The appellant's brief says: "In a proceeding to enforce a vendor's lien the complaint must not only allege, but the evidence on the trial must establish that the vendee has no other property subject to execution." As authority for this, *McCauley* v. *Holtz*, 62 Ind. 205, is cited; but that case does not sustain the proposition. It decides that without such averment and proof there can be no decree to sell the property *in the first instance*. Without such averment and proof the judgment will be for the amount due, and that the land is subject to execution to satisfy it in the event that other property of the defendant subject to execution can not be found.

In the case at bar the land was not ordered to be sold in the first instance; the judgment directed the sale of the land after exhausting the other property of said Ira B. Adams, subject to execution. This was in accordance with the authorities. *Scott* v. *Crawford*, 12 Ind. 410; *Bowen* v. *Fisher*, 14 Ind. 104;

*Stevens* v. *Hurt*, 17 Ind. 141; *Evans* v. *Feeny*, 81 Ind. 532. In this respect there was no failure of necessary evidence. There is no available error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things affirmed, at the costs of the appellant.

Filed June 8, 1883. Petition for a rehearing overruled Nov. 7, 1883.

---

No. 10,593.

## THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY *v.* BATES.

INSTRUCTIONS.—An instruction, so indefinite upon some point that it might mislead, is not error if another given is definite and correct upon the same point.

From the Madison Circuit Court.

*M. S. Robinson* and *J. W. Lovett*, for appellant.

*C. L. Henry* and *H. C. Ryan*, for appellee.

HAMMOND, J.—Complaint by the appellee against the appellant to recover damages for the killing of two heifers and a steer of the appellee by the locomotive and cars of the appellant on its railroad, in Madison county, at a point where the railroad was not securely fenced. Issues were made; trial by jury; verdict for appellee; and judgment on the verdict over the appellant's motion for a new trial.

A number of errors are assigned, but we will consider such only as the appellant's counsel have discussed in their brief.

It is claimed that the verdict is not sustained by sufficient evidence. We have carefully examined the evidence and think that it fairly sustains the verdict. It is urged that it fails to show that the injury occurred in Madison county. The

evidence upon this point was not direct, nor was it required to be. From the circumstances proved, the jury might well infer that the injury happened in that county. This was sufficient. *Indianapolis, etc., R. R. Co.* v. *Moore*, 16 Ind. 43; *Indianapolis, etc., R. R. Co.* v. *Stephens*, 28 Ind. 429; *Louisville, etc., R. W. Co.* v. *Kious*, 82 Ind. 357.

Complaint is made of the second instruction which the court gave the jury. It was as follows:

"2. If you find from the evidence that the plaintiff's cattle were killed by the locomotive, cars and other carriages used on the defendant's railroad, in, or running into, or through Madison county, Indiana, and that such railroad was not securely fenced in, and such fence was not properly maintained by the defendant where, at the point, the cattle entered upon said road, then you should find for the plaintiff and assess his damages at the value of the cattle so killed."

Of this charge counsel for appellant say: "It virtually tells the jury that if the defendant (appellant) owned a railway in, or running into or through, Madison county, Indiana, and that said railroad was not securely fenced in, and said fence maintained at the point where the cattle entered upon said track, that appellee should recover without regard to the point where the accident occurred, whether in Madison county or not."

We do not think that the jury could have understood from the instruction, that the appellee could recover if the injury did not occur in Madison county. The instruction, it is true, did not clearly inform the jury that appellee could not recover unless the damage was occasioned in that county. But the court was more specific in its first charge, explaining to the jury the material averments of the complaint, among which was that relating to the venue, and informing them that the burden of proof was upon the appellee as to such material allegations of his complaint. Taking the charges together, there is scarcely room to suppose that the

jury could have misapprehended the point under consideration. Besides, the evidence showed quite clearly that the injury occurred in Madison county, and there was no evidence tending to prove the contrary.

The record discloses no error. Judgment affirmed at appellant's costs.

**Filed Nov. 7, 1883.**

No. 11,085.

## Dennis et al. *v.* The State.

91 291
130 68
91 291
155 402
91 291
159 334
91 291
164 27

Criminal Law.—*Public Nuisance.—Slaughter-House.—Noisome and Offensive Smells.—Instruction.—Error.*—Where the proprietors of a slaughter-house are prosecuted for maintaining a public nuisance by allowing the offal of slaughtered cattle and other animals to there accumulate, and noisome and offensive smells are emitted therefrom, the fact, if it be the fact, that such smells are blended with like smells emanating from another slaughter-house and other offal there accumulated, owned by other parties, is no defence in a prosecution against the defendants only, and can not justify or excuse their offence; and an instruction of the court to that effect is not erroneous.

Same.—*Information.—Matter of Description.—Variance.*—In a prosecution for the maintenance of a public nuisance, matter of description in the information, as to the location of the nuisance, must be proved as charged, and a variance will be fatal; and an instruction to the jury, to the effect that it will be sufficient if they find a part only of such matter of description, is erroneous.

From the Hancock Circuit Court.

*E. Marsh, W. W. Cook, W. H. Martin, J. A. New* and *J. W. Jones*, for appellants.

*F. T. Hord*, Attorney General, *L. P. Newby*, Prosecuting Attorney, and *W. B. Hord*, for the State.

Howk, J.—In this case John Dennis and James Coffield were jointly prosecuted, tried and convicted, upon affidavit and information, for maintaining and causing to be maintained a public nuisance. From the judgment of conviction, they have appealed to this court, and have here assigned a

number of errors; but, as the only questions discussed by their counsel arise under the alleged error of the court in overruling their motion for a new trial, the other errors assigned must be regarded as waived, and therefore are not considered.

Appellants' counsel first insist that the trial court erred in giving the jury the following instruction: "If the defendants maintained a slaughter-house, as charged in the affidavit and information, and allowed and permitted offal of cattle and other animals slaughtered there, if any, to there accumulate as alleged in the information, and noisome and offensive smells were then and there emitted therefrom, which blended with noisome smells emanating from another slaughter-house and a deposit of filth in the vicinity of said slaughter-house, if any, and rendered the air impure or unhealthful, to the injury of the persons named in the information, as therein alleged, the defendants would be liable, and the fact that such other slaughter-house and deposit of filth existed, and exhaled such noisome smells, if such is the fact, would not justify or excuse the wrongful act of the defendants, if provable."

Of this instruction appellants' counsel say: "This charge in effect declares to the jury that the defendants are guilty, if they maintained a slaughter-house, as charged, and suffered and permitted offal to remain and collect thereabouts, and noisome and offensive smells were emitted therefrom, although insufficient to injure or damage either person or property; yet, if this smell, blended with the noisome and offensive smells emanating from another slaughter-house and a deposit of filth in the vicinity of such slaughter-house, rendered the air impure or unhealthful, to the injury of the persons named in the information, then and in such case the defendants are guilty."

The charge is not fairly susceptible, we think, of the construction which counsel place upon it. Fairly construed, the instruction told the jury that, if the defendants allowed the

offal of cattle and other slaughtered animals to accumulate at their slaughter-house, as charged in the information, from which noisome and offensive smells were emitted, which rendered the air impure or unhealthful, to the injury of the persons named in the information, the defendants would be liable, even if the fact were that such noisome and offensive smells were blended with like smells emanating from another slaughter-house and a deposit of filth in its vicinity, and that such fact would not justify or excuse the wrongful act of the defendants, if such act were provable. The fact, if it were the fact, that the proprietors of another slaughter-house, in the vicinage, were guilty of a like offence with the defendants, can not constitute a defence in a prosecution against the defendants only; and this, in effect, is what the jury were told in the instruction complained of. The jury could not have been misled by the instruction, and it contained, as we construe it, a correct statement of the law. *Attorney General* v. *Steward*, 20 N. J. Eq. 415; section 2066, R. S. 1881.

It is next claimed by the appellants' counsel that the first instruction of the court to the jury was erroneous. It was charged in the affidavit and information, among other things, that the defendants at, etc., on, etc., and near the dwelling-houses of Joseph Loehr, Noble Warrum and Rufus Scott, and divers other citizens, etc., unlawfully maintained, and caused to be maintained, in said county, a slaughter-house for the purpose of slaughtering cattle, etc., where they, the defendants, unlawfully caused and suffered the entrails and offal of cattle, hogs and other animals to be collected and remain in and about their slaughter-house to the injury of Joseph Loehr, Noble Warrum and Rufus Scott, and divers other citizens being, passing and residing near their slaughter-house, by reason whereof divers noisome and offensive smells were from them emitted, etc., so that the air then and there was filled and impregnated with such smells, and made offensive, uncomfortable, unwholesome and injurious to the health, comfort and property of said citizens and individuals, etc., to their dam-

age, etc. The appellants' objection to the first instruction is that the jury were told that if they found from the evidence, among other things, that the defendants maintained their slaughter-house "near the residences of Noble Warrum and Rufus Scott," etc., and that the air was filled and impregnated with the smells, etc., and made offensive, etc., to the health, comfort or property of the said Noble Warrum or Rufus Scott, etc., then the State would be entitled to a conviction. The point is made by the appellants' counsel that the allegations in the affidavit and information, in regard to the location of the slaughter-house near the residences of Loehr, Warrum and Scott, and that the nuisance described was to the injury of Loehr, Warrum and Scott, were matters of description and must be proved as charged; and that, therefore, it was error in the court to instruct the jury, as it did in the first instruction, that as to these allegations the State would be entitled to a conviction, if the evidence showed beyond a reasonable doubt the location of the slaughter-house near the residences of two of the three persons named, and that the nuisance charged was injurious, etc., to two of the three persons mentioned in the affidavit and information. If counsel are correct in their position that the allegations referred to are matters of description, then, although they were made unnecessarily, they must be proved as made, before the State could be entitled to a conviction. The evidence is not in the record, but the charge against the appellants is predicated solely upon the affidavit of Joseph Loehr, the only one of the three persons mentioned in the affidavit and information, as the individuals injured by the alleged nuisance, whose name is twice omitted from the first instruction; that is, the State is not required in the instruction complained of to show by its evidence either that the appellants' slaughter-house was located near the residence of Joseph Loehr, the prosecuting witness, or that the alleged nuisance was injurious to the health, comfort or property of Loehr, before the defendants could be convicted.

Is the phrase "near the residence of Joseph Loehr, Noble

Warrum and Rufus Scott," matter of description or matter of venue only? It can not be regarded as matter of venue, because the venue of the offence charged was previously alleged, in both the affidavit and information, to be "at said county of Hancock and State of Indiana." The phrase must, therefore, be regarded as matter of description, and although it was alleged unnecessarily, and was not a material averment in the affidavit and information, yet, having been alleged, it must be proved, under the decisions of this court, precisely as charged, and a variance will be fatal. *Ball* v. *State*, 26 Ind. 155; *Wertz* v. *State*, 42 Ind. 161, and authorities cited.

It was error in the court, therefore, to instruct the jury as it did, in effect, in the instruction under consideration, that the State is entitled to a conviction, even though it had not proved the matter of description above quoted, precisely as charged in the affidavit and information.

Other instructions of the court are complained of in argument by the appellants' counsel, but these need not be considered, as the motion for a new trial ought to have been sustained for the error in giving the first instruction.

The judgment is reversed, and the cause is remanded for a new trial.

Filed Nov. 7, 1883.

No. 10,842.

## The Louisville, New Albany and Chicago Railway Company *v.* Quade.

Railroad.—*Killing Stock.*—*Fencing.*—*Complaint.*—*Demurrer.*—In an action against a railroad for killing stock, the complaint alleged that the defendant, while running its cars over the road, at a place where their road was not securely fenced, ran over and killed certain stock; that at the place where such stock entered on the defendant's road was not at the crossing of any public highway or in the corporate limits of any city or town, but was at a place where the company was required by law to fence and could have fenced. On demurrer,

The Louisville, New Albany and Chicago Railway Company *v.* Quade.

*Held*, that the complaint did not aver that the road was not fenced securely at the place where the stock entered.

SAME.—*Presumption of Law.*—If the place at which the stock entered was one which the road was required to fence and was capable of being fenced, as alleged, the presumption is that the company had done its duty in regard to fencing it.

From the Jasper Circuit Court.

*W. F. Stillwell*, for appellant.

*J. N. Wallace*, for appellee.

NIBLACK, C. J.—Action by Julius Quade against the Louisville, New Albany and Chicago Railway Company for killing live-stock. The action was commenced in the White Circuit Court, and taken upon a change of venue to the Jasper Circuit Court. The complaint was in two paragraphs.

The first paragraph charged that on the 7th day of May, 1882, at the county of White, and State of Indiana, the defendants, while running a train of cars over their line of road in said county of White, "at a place where their road was not securely fenced, ran over and killed, with their engine and cars, one mare and yearling colt, the property of the plaintiff, of the value of two hundred and twenty-five dollars; that at the place where said mare and colt entered on the defendant's road was not at the crossing of any public highway, street crossing, or within the corporate limits of any city or incorporated town, but was at a place where the company were required by law to fence their road, and at a place where they could have fenced their said road."

The second paragraph charged the defendants with running their train of cars over, and, in the same county, killing a heifer belonging to the plaintiff, of the value of forty dollars, on the 5th day of January, 1882.

Separate demurrers were overruled to both paragraphs of the complaint. Issue; trial by the court; finding and judgment for the plaintiff for one hundred and ninety dollars.

It is claimed that the first paragraph of the complaint can not be construed as averring that the place at which the mare

and colt entered upon the railway track was not securely fenced, and that for that reason the demurrer to that paragraph ought to have been sustained.

This appears to us to be a well grounded objection. It is averred that the mare and colt were *killed* at a place at which the road was not securely fenced, and that the point at which they entered upon the road was a place where the company were required by law to fence their road, and where it could have been fenced; but these allegations do not amount to an averment that the road was not securely fenced where the mare and colt went upon it. These animals may have gone upon the road at a point at which it was securely fenced, and been killed where it was not so fenced. In such an event the company was not liable for the killing. *Bellefontaine R. W. Co.* v. *Suman*, 29 Ind. 40; *Jeffersonville, etc., R. R. Co.* v. *Brevoort*, 30 Ind. 324; *Toledo, etc., R. W. Co.* v. *Howell*, 38 Ind. 447; *Jeffersonville, etc., R. R. Co.* v. *Lyon*, 72 Ind. 107.

If the place at which the animals entered was one at which the company were required to keep a fence, and was a place capable of being fenced, the inference ought rather to be that the company had done their duty in regard to fencing the road.

We see no ground upon which the sufficiency of the paragraph in question can be maintained.

The judgment is reversed with costs, and the cause remanded for further proceedings.

Hammond, J., was absent.

Filed Nov. 8, 1883.

---

No. 10,658.

## The Ætna Insurance Company *v.* Weissinger, Administrator.

**Fire Insurance.**—*Cancellation of Policy.*—In a suit upon a fire policy containing a condition authorizing the underwriter to cancel the policy upon repayment of a ratable part of the premium, it was answered that this

had been done before the fire; that the parties agreed upon $13 as the return premium, which had been paid and accepted. The evidence showed that a ratable part of the premium was $13.83, and there was a verdict for the plaintiff, though the evidence showed the agreement to receive and the payment of $13 as pleaded.

*Held*, that the answer was good, and a new trial should have been granted.

From the Posey Circuit Court.

*W. H. De Wolf* and *S. N. Chambers*, for appellant.

*A. P. Hovey* and *G. V. Menzies*, for appellee.

BICKNELL, C. C.—This was an action upon a policy of insurance, No. 339, by the administrator of the assured. The complaint was in the common form, alleging a loss by fire on May 29th, 1879. One of the conditions of the policy was that, "if the company shall so elect, it shall be optional with the company to cancel the policy, which shall cease on notice being given to the assured, his or their representatives, of its decision to do so, and on tendering a ratable proportion of the premium for the unexpired term."

The defendant answered in three paragraphs:

1. The general denial.

2. Admitting the execution of the policy and the loss, and averring that before such loss the company availed itself of said condition, and on February 18th, 1879, by its agent, paid the assured thirteen dollars, which he received and accepted in full payment as the ratable proportion of the premium for the unexpired term of the policy, and said policy was then cancelled, and the assured agreed to return said policy to the company.

3. This paragraph differed from the second paragraph by averring that the assured owed Frank Smith fifty dollars; that the defendant notified the assured of its election to determine the policy, and that the defendant and the assured agreed that the premium for the unexpired term of the policy was thirteen dollars, and that said sum should be paid by the defendant to said Smith, to be credited on his account against the assured; that said sum was so paid and credited, and the assured gave the defendant the following receipt signed by him:

"$13. MOUNT VERNON, IND., February 18th, 1879.

"Received of W. L. Sullivan, agent of the Ætna Insurance Company of Hartford, Connecticut, the sum of thirteen dollars, being for return premium on No. 339 cancelled."

The plaintiff replied in denial of these special defences. The issues were tried by the court who found for the plaintiff $1,200. The defendant's motion for a new trial was overruled. Judgment was rendered upon the finding, and the defendant appealed.

The only error assigned is, overruling the motion for a new trial. There were several reasons for a new trial, but the only question discussed in the appellant's brief is the sufficiency of the evidence. The condition hereinbefore set forth was valid, but the right thereby secured to the company could be exercised only by a strict compliance with the condition. In the absence of any further agreement the whole ratable proportion of the premium was required to be refunded. The payment of a less sum would not alone put an end to the insurance. *Van Valkenburgh* v. *Lenox F. Ins. Co.*, 51 N. Y. 465; *Hathorn* v. *Germania Ins. Co.*, 55 Barb. 28; May Ins., section 574; Wood Ins., section 106.

It is not alleged in the second paragraph of the answer that the whole amount of the ratable proportion of the premium was actually paid. The allegation is that thirteen dollars was paid, which was accepted as a full payment of such ratable proportion, and thereupon the policy was cancelled, and the assured agreed to return it to the defendant. And the third paragraph of the answer does not allege that the amount paid was the whole amount of such ratable proportion. Its allegation is that it was agreed between the assured and the defendant that the amount of such ratable proportion was thirteen dollars, which was paid and accepted in full thereof, the assured giving the defendant a receipt therefor, "being for return premium on No. 339 cancelled."

These defences being met only by the general denials, if

either of them was sustained by the evidence, the finding should have been for the defendant.

The evidence was substantially as follows:

The plaintiff proved the policy and the loss as stated in the complaint, and that the defendant had refused to pay the policy, alleging that it had been cancelled. Here the plaintiff rested and the defendant proved and read in evidence the receipt as set forth in its third defence, and also proved a conversation between the assured and the defendant's agent, in which the assured directed the agent to give him credit on his account in the books. They were talking about insurance and policies, but the witness could not say what policy they were speaking of.

The defendant then rested, and the plaintiff, in rebuttal, proved that the unearned premium on the policy was $13.83, and that on a cancellation by mutual agreement, the amount to be paid would be agreed upon, and that when a policy is cancelled, there are two rates known to insurance companies, the long and the short rate; that on a cancellation by request of the assured, the short rate is charged; if cancelled by the company, the long rate is charged. This closed the proof.

Upon this evidence it clearly appears that the unearned premium was not refunded; eighty-three cents of it was left unpaid. But, as already stated, there was no issue joined as to that.

The defendant, in its defences, had not averred that the whole amount of the unearned premium was paid. Their averment was substantially that the defendant and the assured had agreed that the amount of the unearned premium was $13, which the company had paid, and the assured had received, as a full payment of the ratable proportion of the premium, and that the assured had given the defendant a writing stating that he had received $13 for return premium on the policy, and that the same was cancelled.

The assured had a right to take or refuse the $13. He had a right to agree with the defendant that the unearned pre-

mium was $13; he had a right to take that sum in cancellation of the policy. The receipt shows that he did this. There was no evidence tending to show any mistake in the writing; it was given for the amount actually paid and received, and shows upon its face that that amount was taken for the cancellation of the insurance. Even where a mistake in such a writing can be corrected, it can be done only upon proper averments and evidence. Not only was the answer substantially sustained by the evidence, but, upon the issues joined by the reply, the evidence was all in support of the answer. It was not a case of conflicting evidence, nor of immaterial issues; the special defences allege an agreement as to the amount to be paid upon cancellation, the payment of that amount, and thereupon a cancellation of the policy. These defences were proved in substance, and they constituted a sufficient defence to the action. The court, therefore, erred in overruling the motion for a new trial. The judgment ought to be reversed and a new trial should be granted.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Filed Nov. 7, 1883.

91 301
129 348

91 301
131 294

91 301
136 658

91 301
167 168

No. 10,804.

## BARNES *v.* UNION SCHOOL TOWNSHIP.

VENDOR AND VENDEE.—*Statute of Frauds.—Possession.—Notice.*—The purchase of lands by parol, payment of the price, possession given and taken under the purchase, make a valid contract, notwithstanding the statute of frauds, and such possession is notice to a subsequent purchaser, so that an action by him for possession will be defeated.

REAL ESTATE, ACTION TO RECOVER.—*Counter-Claim.—Quieting Title.*—To a suit for possession of lands and to quiet title, the defendant may by way of counter-claim set up a title in equity in himself, and pray to have his title quieted.

From the Montgomery Circuit Court.

*T. E. Ballard* and *M. E. Clodfelter*, for appellant.
*E. C. Snyder* and *M. W. Bruner*, for appellee.

FRANKLIN, C.—Appellant sued appellee for the possession of, and to quiet the title to, a certain school lot.

Appellee answered by a general denial, and filed a counter-claim.

Appellant demurred to the counter-claim, which demurrer was overruled, and a reply was filed.

There was a trial by the court, a special finding made, and conclusions of law stated. Appellant excepted to the conclusions of law, and moved for a new trial, both of which were overruled, and judgment rendered for the appellee.

Errors have been assigned upon the foregoing rulings:

Both parties claim the real estate through one Henry Sperry; appellant claims that said Sperry in 1874 mortgaged said half-acre school lot, with other lands, to one Busenbark, who bought it at a sheriff's sale on a foreclosure of the mortgage in 1878, and in 1879 received a deed therefor; that appellant bought it from Busenbark and received a deed for it in 1880. Appellee claims to have bought the half-acre school lot from Sperry in 1853, paid the full purchase-money, took possession under the contract, and erected a valuable school house thereon, and has held possession of the same ever since, and that in 1856 said Sperry executed to appellee a title bond for a conveyance by deed to said school lot. This claim of appellee is set forth more particularly in the counter-claim. We see no reasonable objection to this counter-claim; it is a good claim for specific performance, without the execution of the bond. There was no error in overruling the demurrer to it.

The reasons for a new trial are based alone upon the sufficiency of the evidence. The evidence is not in the record. Therefore, the specification of error, based upon the overruling of the motion for a new trial, presents no question for consideration. The special findings are substantially as follows:

That in May, 1856, one Henry Sperry was the owner and

in possession of the real estate in controversy; that the citizens then by donation erected a school-house thereon; that about that time, or shortly afterwards, said Sperry, having sold the same to appellee, executed to appellee a title bond for said lot, received the purchase-money therefor, and put appellee in possession thereof; that schools by subscription were taught in said house a portion of each year for several years after its erection, and that schools, either public or private, were taught in said house a portion of each year up to 1870 or 1871; that about the year 1870 or 1871, said original house was removed from said lands, and said lands remained vacant one week, when said Union School Township, by its school trustees, commenced the erection of a new school building on the site which the old one had formerly occupied, which was soon completed and occupied for school purposes by said defendant, and ever since has been, and now is, used for school purposes by said defendant, school being taught in it each year; that appellee's claim consists in said title bond, possession under it, payment of the purchase-money, and the erection of permanent improvements; that said Sperry, on the 6th day of November, 1874, executed to said Busenbark a mortgage on ten acres of land including said school-house lot; that said mortgage was foreclosed in September, 1877, and upon sheriff's sale said Busenbark bought the mortgaged property, and received his deed August 21st, 1879; that at the time of the execution of said mortgage, sale, and deed to Busenbark, he had no notice of any claim of defendant to the lot other than such constructive notice as was given by the school building standing on said land, and the lot being enclosed with a fence; that on the 25th day of October, 1880, said Busenbark conveyed by deed said land, including said school lot to appellant; that said Barnes, at the time she purchased and received a deed from said Busenbark, had no notice of the defendant's claim, except the situation of the improved school lot as above described; that appellant and her grantors have all the time paid the taxes on said lands; that the value of the real estate in controversy is $700.

Upon the foregoing facts the court stated as a conclusion of law that the defendant, Union School Township, is the owner of the land in controversy, and has the right to have its title thereto established and quieted.

Appellant in her brief insists that these facts do not establish a legal title in appellee by twenty years adverse possession. This is not controverted by appellee, but appellee insists that they establish a good equitable title and the right to possession in appellee, and are therefore sufficient to defeat the plaintiff's action.

The possession of appellee was sufficient notice to appellant of whatever rights appellee had in the premises. *Johnston* v. *Glancy*, 4 Blackf. 94 (28 Am. Dec. 45); *Moreland* v. *Lemasters*, 4 Blackf. 383; *Paul* v. *Connersville, etc., R. R. Co.*, 51 Ind. 527.

The facts found contain every element necessary to constitute a good, equitable title in apppellee: The purchase of the school lot, possession under the purchase, full payment of the purchase-money, and the erection of valuable and permanent improvements. A stronger equitable title and the right to possession could not be established. See the following cases: *Patterson* v. *Doe*, 8 Blackf. 237; *Church* v. *Cole*, 36 Ind. 34; *Maxwell* v. *Campbell*, 45 Ind. 360; *Emily* v. *Harding*, 53 Ind. 102; *Graham* v. *Graham*, 55 Ind. 23; *Hampson* v. *Fall*, 64 Ind. 382; *Webster* v. *Bebinger*, 70 Ind. 9.

These authorities fully establish that it is proper, in an action for possession, and to quiet title to real estate, for the defendant to plead such a counter-claim as is herein set forth. And under our statute all defences both legal and equitable may be given in evidence under the general denial, which was pleaded in this case. There is no error in the conclusions of law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Nov. 7, 1883.

No. 9907.

## BUTT *v.* BUTT ET AL.

| | |
|---|---|
| 91 | 305 |
| 138 | 81 |
| 91 | 305 |
| 153 | 419 |
| 91 | 305 |
| 158 | 321 |
| 158 | 322 |
| 158 | 326 |

STATUTE OF FRAUDS.—*Contract.—Agreement to Extend Time for Redemption of Land Sold on Execution.*—A., who had arranged for an assignment to himself of a sheriff's certificate of purchase of the lands of B., agreed by parol with B. to give six years to redeem, acting on the faith of which B. did not redeem within the year, as he could and otherwise would have done. A. took a sheriff's deed at the end of the year allowed for redemption, and then refused to perform his agreement, and claimed title and took possession, whereupon B. brought suit to redeem.

*Held*, that the contract between A. and B. was not within the statute of frauds, and B. had a right to redeem.

From the Wabash Circuit Court.

*M. H. Kidd* and *N. G. Hunter*, for appellant.

*J. L. Farrar, J. Farrar, W. C. Farrar, C. Cowgill, H. B. Shively* and *C. E. Cowgill*, for appellees.

HAMMOND, J.—Complaint by the appellant against the appellees who are husband and wife, to redeem real estate after the year for redemption, and after the execution of a sheriff's deed, on a decree of foreclosure.

The appellees' demurrer, for want of facts sufficient to constitute a cause of action, was sustained to the appellant's complaint. Declining to amend his complaint, judgment was rendered against him in favor of the appellees on the demurrer. The appellant, having excepted to the ruling of the court, assigns the same as error in this court.

The following facts are stated in the complaint:

On March 8th, 1873, the appellant, being the owner of the real estate in controversy, mortgaged the same to William W. Haney to secure a debt of $4,000, due five years after date, with interest at ten per cent., to be paid annually. Three years' interest being due and unpaid, Haney foreclosed the mortgage in 1876, in the court below, for the amount then due and thereafter to become due. The appellant afterwards

paid on the judgment $1,562.62. Under an order of sale duly issued, the real estate was sold at sheriff's sale, on November 2d, 1878, to Haney, for $5,179.94, that being the amount then due on the judgment. The sheriff gave Haney a certificate of purchase, entitling him to a sheriff's deed at the expiration of one year if the land were not redeemed as provided by law.

In January, 1879, Haney assigned the certificate of purchase, for value, to Elbert H. Shirk. The name of the assignee in the written assignment was left blank. This was done pursuant to a previous agreement between Shirk and the appellee William Butt, to the effect that as soon as said William should pay said Shirk certain debts owing by William, and also pay the amount for which the land sold at sheriff's sale, the certificate was to be assigned to William, and his name written, as the assignee thereof, in the blank left for that purpose. In April, 1879, before the expiration of the time for redemption, William informed the appellant of his said arrangement with Shirk, and proposed that he, the appellant, need not exert himself to redeem within the year, but might continue in the possession of the real estate for six years, and might, out of the profits thereof, redeem at any time within six years from April 15th, 1878, by paying the amount for which the land sold at sheriff's sale, with interest. The appellant accepted this proposition, and the same then became the oral agreement between the parties. The appellant relied upon this agreement, fully believing that William would carry it out in good faith, and at the instance of William applied large sums of money to the payment of other debts, which, had it not been for the contract to extend the time for redemption, would have been applied on such redemption.

Soon after the expiration of the year of redemption, as fixed by law, namely, on November 5th, 1879, William, disregarding said agreement, claimed and demanded as his own all corn grown by the appellant on said land that year, and

seized and converted to this own use large quantities of the same, and began harassing and vexing the appellant and denying his right to retain possession of said land, or to receive the rents thereof, and finally took possession of the land, and has since continued to hold the same, denying the appellant's right to redeem.

Shirk, on July 2d, 1881, in compliance with his agreement with William, assigned said certificate to the latter, inserting his name in the blank assignment. The sheriff, on the same day, executed to William a sheriff's deed for the land.

The real estate is worth $10,000. The amount which would have been necessary to redeem within one year from the sale was $5,690. The redemption would have been made within that time had not the appellant relied upon his agreement with William for the six years' extension of time. The rents and profits of the real estate since the possession thereof by William are of the value of $3,000. William has also cut down, carried away and sold timber from the real estate of the value of $600, which he has converted to his own use. Before suit the appellant demanded of William an accounting of the amount of the rents and profits and the waste and the amount necessary for redemption and offered to redeem, all of which was refused and denied. Prayer for an accounting, the ascertainment of the amount due, and that the appellant be allowed to redeem.

It is insisted by counsel for the appellees that the contract to extend the time of redemption for six years, not being in writing, nothing having been paid on it, and it not being an agreement that was to be performed within a year, was void, as being within the statute of frauds.

A statute which is intended to prevent fraud should not be permitted to be used for its promotion. *Arnold* v. *Cord*, 16 Ind. 177; *Teague* v. *Fowler*, 56 Ind. 569; *Butcher* v. *Stultz*, 60 Ind. 170. Contracts within the statute of frauds are not void, but merely voidable. When fully consummated, they become valid. They become binding when so far exe-

cuted that the parties can not be placed *in statu quo*. The law, we think, is of universal application that the statute of frauds can not be invoked for the protection of any right, or undue advantage acquired by a contract not enforceable under its provisions. The contract set up in the appellant's complaint was not immoral, nor against public policy, nor in any way illegal. If it be conceded that it could not be specifically enforced, nor damages recovered for failure of either party to comply with its terms by reason of its being within the statute of frauds, it was, notwithstanding, a contract that the parties might have carried out without any violation of law or good morals. Just men, after making such a contract, would have felt bound in conscience to observe it. The appellant, therefore, in relying upon the contract and allowing the time fixed by law for the redemption of his land to expire, was not guilty of laches. His confidence in the word of the appellee, authorized, perhaps, by previous acquaintance, was certainly not blamable. Now, to permit the appellee to take advantage of this confidence would be subverting the purposes of the statute on which he relies. According to the complaint the appellee William has obtained real estate of the value of $10,000 for less than $6,000. Had he obtained money from the appellant on an oral agreement that he would convey him real estate, he might have refused to make the conveyance by reason of the contract not being in writing, but the law would require him to restore the money. The appellant, when the contract set out in his complaint was made, had an undisputed legal right to redeem the land up to and including the 2d day of November, 1879. This right the appellee agreed to extend for six years from April 15th, 1878. The appellant relied upon the agreement and did not redeem within the statutory period. After its expiration the appellee William obtained a sheriff's deed and denied the appellant's right of redemption. Conceding, without deciding, that he had the legal right to repudiate the contract, we are satisfied that he could not thereby affect the

appellant's right to redeem within a reasonable time after such repudiation. Not to permit a redemption would be giving the appellee the advantage of his own wrong. It is insisted that the wrong complained of related to the non-performance or violation of an executory contract, and not to an existing fact; and hence it is urged that there was no fraud of which the law takes cognizance. But it must be borne in mind that the fraud upon which the appellant's action is based was not the agreement to extend the time of redemption, but the wrong done after the statutory period expired in procuring, in violation of the agreement, the sheriff's deed and denying the appellant's right of redemption. The acts which constitute the injury were done contrary to an agreement upon which the appellant had a right to rely. They were done with reference to an existing fact, namely, the agreement, and, we think, if proved as alleged, that they were so fraudulent as to entitle the appellant to the relief asked in his complaint.

It is urged, also, that the contract was not binding upon the appellee William, as he did not own the certificate of purchase at the time of the agreement to extend the time of redemption. But he assured the appellant that the certificate was under his control, and the facts alleged show that Shirk simply held it as his trustee. When the arrangement between him and Shirk was executed, he should not be allowed the advantage of preventing a redemption by denying his power to make the contract, whereby he had lulled the appellant into repose until the time for redemption, as fixed by law, had expired.

The authorities, though not numerous, are with us, we think, in these views.

In *Southard* v. *Pope*, 9 B. Mon. (Ky.) 261, in speaking of an agreement to extend the time of redemption, it is said by the court: "The extension of the time of redemption is merely a waiver of the forfeiture of the right until that period arrives, and can not, without an evident perversion of

the true design of the parties, have the effect of converting the purchase into a mere lien to secure the repayment of the purchase-money. As an agreement by the purchaser to prolong the time might operate to prevent a redemption within the legal period, a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed, would be a fraud upon the defendant in the execution, and authorize an application by him to a court of equity for relief."

In *Griffin* v. *Coffey*, 9 B. Mon. 452, it was said by the same court: "The right to redeem being a right created by law, the time for its exercise may be prolonged by the verbal agreement of the parties. To permit a purchaser, who had made a verbal contract of this kind, and thereby caused the defendant in the execution, to postpone the exercise of his right of redemption to a future period, to defeat the effect of the contract by relying upon the statute of frauds, would be to allow the statute, which was intended to prevent frauds, to be used as an instrument for its promotion."

The case of *Martin* v. *Martin*, 16 B. Mon. 8, was a case in all essential respects like the one before us. There, a purchaser under a decree of foreclosure for about one-third the value of the land, with an assurance to the debtor that he might redeem, sold the benefit of his purchase to a third person, who promised the debtor and purchaser to extend the privilege of redemption to the debtor beyond the time fixed by law. It was held that though the agreement was by parol, it was a trust which the purchaser could not refuse to perform, and redemption was allowed after expiration of the statutory period.

The decisions of this court strongly support the appellant's right of redemption. *Plaster* v. *Burger*, 5 Ind. 232; *Gwaltney* v. *Wheeler*, 26 Ind. 415; *Hughart* v. *Lenburg*, 45 Ind. 498; *Spath* v. *Hankins*, 55 Ind. 155; *Tinkler* v. *Swaynie*, 71 Ind. 562; *Cox* v. *Arnsmann*, 76 Ind. 210; *McOuat* v. *Cathcart*, 84 Ind. 567; *Taggart* v. *McKinsey*, 85 Ind. 392; *Ayers* v. *Slifer*, 89 Ind. 433.

We think, under the facts stated in the appellant's complaint, he would have the right of redemption.

Judgment reversed, at the appellees' costs, with instructions to the court below to overrule the appellees' demurrer to the appellant's complaint, and for further proceedings in accordance with this opinion.

Filed Nov. 8, 1883.

---

No. 10,735.

## REIGELSBERGER *v.* STAPP.

SUMMONS.—*Service of.*—The time of the service of a summons is to be computed by excluding the day of service and including the return day, and, therefore, service on the 5th day of the month for the 15th is sufficient ten days' personal service under section 516, R. S. 1881.

From the Shelby Circuit Court.

*O. J. Glessner*, *E. K. Adams* and *L. J. Hackney*, for appellant.

*N. B. Berryman* and *R. W. Wiles*, for appellee.

ELLIOTT, J.—Appellant moved to set aside a default entered against him, upon the ground that the service of summons was not sufficient to drive him to answer. He places his case upon this ground alone, and does not claim that he had any defence to the action.

If there was no legal service of process then this appeal must be sustained, otherwise not. *Houk* v. *Barthold*, 73 Ind. 21. The complaint was filed on the third day of January, 1881, and was thus endorsed: "The clerk will issue summons in this cause for the defendant to appear January 15th, 1883, the same being the 25th judicial day of the December term, 1882, of the Shelby Circuit Court." The writ was served on the 5th day of January, 1883, and on the 15th day of that month judgment was entered. We think the service was in time. It was uniformly held under the original pro-

visions of the code of 1852 that the time of service was to be computed by excluding the day of service and including the return day. *Womack* v. *McAhren*, 9 Ind. 6; *Blair* v. *Davis*, 9 Ind. 236; *Martin* v. *Howell*, 8 Ind. 501; *Krohn* v. *Templin*, 2 Ind. 146. In accordance with the doctrine of these cases, it was ruled in *Monroe* v. *Paddock*, 75 Ind. 422, that service on the ninth day of the month was sufficient to entitle the plaintiff to judgment by default on the 19th day of the same month. We think we should adhere to that ruling, as it was made upon the statute now in force.

Judgment affirmed.

Filed Nov. 9, 1883.

No. 11,233.

## Dudley *v.* The State.

Intoxicating Liquor.—*Sale Without License.*—*Defence.*—In a prosecution for an unlawful sale of intoxicating liquor, in a less quantity than a quart, the facts that the defendant had, prior to such sale, upon proper notice and after having given the bond required by the statute, obtained from the proper county board an order granting him license to sell such liquor in a less quantity than a quart at a time, for the term of one year, are not sufficient to constitute any defence, when it appears that the offence was committed and the indictment against him was returned before he had paid the requisite fee for, or taken out, his license.

From the Sullivan Circuit Court.

*W. S. Maple* and *W. C. Hultz*, for appellant.

*F. T. Hord*, Attorney General, *J. D. Alexander*, Prosecuting Attorney, and *S. C. Coulson*, for the State.

Howk, J.—In this case, the appellant, Dudley, was indicted for an unlawful sale of intoxicating liquor, in a less quantity than a quart at a time, to wit, one gill, on the 12th day of March, 1883; "he, the said William G. Dudley, not then and there having a license to sell intoxicating liquor in

a less quantity than a quart at a time, in force at the time according to the laws of this State."

The cause was properly put at issue and tried by the court, and a finding was made that the appellant was guilty, as charged in the indictment, and assessing his fine, and, over his motion for a new trial, judgment was rendered accordingly.

The overruling of his motion for a new trial is the only error assigned by the appellant in this court. The only cause assigned for such new trial was, that the finding of the court was "contrary to the law and the evidence in this case."

The sale of the intoxicating liquor by the appellant, as charged in the indictment, is not denied by his counsel. But the facts relied upon by counsel for the reversal of the judgment are that appellant had given the notice, required by section 5314, R. S. 1881, for the time therein prescribed, that he would apply to the board of commissioners of Sullivan county, at its March term, 1883, for a license to sell spirituous, vinous, malt and other intoxicating liquors, in a less quantity than a quart at a time, for one year, etc.; that, having proved the publication of such notice and filed his petition for such license, together with the bond required by section 5318, R. S. 1881, the county board made an order granting him the license prayed for, for one year from the 5th day of March, 1883; and that on the 28th day of March, 1883, having then fully paid the requisite fee therefor, the license was duly issued to him by the county auditor, for the term of one year from March 5th, 1883.

The indictment was returned into court, in this case, on the 24th day of March, 1883, and charged an offence committed on March 12th, 1883, between the date of the order of the county board granting the license, and the date of the full payment of the license fee and of the issue of the license. The question for decision is this: Do the facts relied upon by the appellant, above recited, constitute any valid or legal defence to this prosecution, or authorize this court to reverse

the judgment of the trial court? We are of opinion that this question must be and ought to be answered in the negative. It has never been held by this court, in such a case as the one at bar, that the issue of a license would constitute a good defence to a prosecution, previously instituted and then pending, for an offence committed between the date of the order, granting the license, and the date of such license, even though the license in terms embraces and covers the date of such offence. *Keiser* v. *The State*, 78 Ind. 430, and cases cited.

Appellant's counsel quote from the opinion of the court, in *Keiser* v. *The State*, *supra*, as follows: "The law plainly requires that the licensed seller of intoxicating liquors shall be under bond, with sureties, conditioned as prescribed in the statute. He can not be under license unless at the same time under bond. The appellant, at the time of the sale in question, had not given bond and had no license, and though it should be held that, under some circumstances, the license might relate back, it can not be held in this case for the reason, if no other, that the appellant had given no bond at the time of the sale, on which the prosecution is based."

In the case in hand, as we have seen, the appellant's bond was filed with his petition, and was approved before or at the time the county board made the order granting him the license. On behalf of the appellant, it is insisted with much earnestness that the "circumstances" of his case were such that his license ought to relate back and constitute a defence to this prosecution, commenced before and pending at the time of his procurement of his license. Whether, in such a case, the "circumstances" are such as would render the prosecution an act of seeming hardship or injustice, or not, is a question to be considered or decided, in any case, which we very much doubt, but do not decide; it is a question for the consideration of the prosecuting attorney, with the advice and approval of the trial court. Where, as in this case, the prosecuting attorney insists upon the prosecution and conviction

of the defendant, and the court below, over his motion for a new trial, concurs in and approves of such conviction, we are of opinion that the "circumstances" relied upon afford this court no legal ground for reversing the judgment.

The motion for a new trial was correctly overruled.

The judgment is affirmed with costs.

Filed Nov. 8, 1883.

---

No. 9926.

## FOULKS *v.* FALLS.

| | |
|---|---|
| 91 | 315 |
| 150 | 258 |
| 159 | 343 |

ATTORNEY AND CLIENT.—*Contract.*—*Receipt.*—A writing acknowledging the receipt of a claim "for collection" is a contract to collect, and if given by one not an attorney, who at the time represents himself as such, it imposes on him the duty and liability of an attorney.

SAME.—*Evidence.*—Where a receipt of a claim for collection is not signed by the party as an attorney, in an action thereon for failure to collect, parol evidence is admissible to show in what capacity the defendant received the claim, but not to vary the terms of the receipt.

SAME.—*Attachment, Duty as to.*—It is not the duty of an attorney to make the affidavit or execute the bond in attachment, even when instructed to attach; nor should the practice of so doing be encouraged, and there is no liability for failing to do so.

SAME.—*Statute of Limitations.*—A suit to enforce the liability of an attorney upon one not an attorney, who agrees in writing to collect a claim, upon the ground that he orally represented himself to be an attorney, is not upon a contract partly by parol, and is not barred by the limitation of six years.

From the Knox Circuit Court.

*G. G. Reily, W. C. Johnson, W. C. Niblack, W. H. DeWolf* and *S. N. Chambers*, for appellant.

*O. F. Baker*, for appellee.

ZOLLARS, J.—In March, 1881, the appellee instituted this suit against appellant and two others upon the following written instrument:

"VINCENNES, February, 1874.

"Received of Mrs. Diana Falls, one note against Z. P.

Estes for eleven hundred dollars, having credits of three hundred and sixty-seven dollars; this for collection.

"H. A. FOULKS."

The purpose of the action is to charge the defendants, as attorneys, for a failure to collect the note or due-bill against Estes as agreed upon. The substantial averments of the complaint are, that on the 18th day of February, 1874, the defendants represented themselves to the plaintiff to be attorneys at law, and as partners, engaged in that business and profession; that appellee, on that day, being the owner of a due-bill (called a note in the above written instrument) executed by Estes, and he being a non-resident of the State and the owner of land in Knox county of the value of $2,000, of all of which the defendant knew, she contracted with them in writing for the collection thereof, by due process of law, which contract they executed by the name and style of H. A. Foulks; that contemporaneous with the execution of said contract, appellee directed them to institute a proceeding in attachment, to attach the land of Estes, which they then undertook and promised to do, but negligently and unskilfully delayed and failed so to do; that on the 17th day of March, 1874, Estes conveyed the land to an innocent purchaser, and became wholly insolvent, by means of which negligence and failure to obey the reasonable instructions of appellee she lost her claim, to her damage of $2,000. The evidence establishes the following facts, viz.:

Appellant executed the written instrument above set out, and received from appellee a due-bill on Estes. At that time appellant was not engaged in the practice of the law, and was not a lawyer at that time, before nor since.

At that time Estes was the owner of land in Knox county, and on the 17th day of the following month executed a mortgage thereon to an innocent party, for its full, or about its full value, which mortgage was foreclosed in 1875, and the property bought in by the mortgagee.

At, before, and since the time appellant received the due-

bill from appellee, the defendants William H. DeWolf and Smiley N. Chambers were, and have been lawyers, practicing that profession as partners. Appellant never was a partner with them, nor engaged with them in making collections, but in one or two instances had received claims and turned them over to DeWolf and Chambers for collection. A short time after appellant received the due-bill, perhaps the next day, he offered it to DeWolf and Chambers for collection, but they, at that time, declined it, because they were not practicing in Illinois, where Estes lived. On the 16th day of March, 1874, hearing that Estes was in Vincennes, DeWolf and Chambers filed a complaint upon the due-bill, and caused summons to issue, but the sheriff failed to find him.

In April following, a settlement was made with Estes, the due-bill was surrendered to him, and he executed a new note to appellee. On the 18th day of June following, upon an affidavit and bond made and executed by appellee, a suit in attachment was instituted in favor of appellee against Estes on the new note. After this the new note was exchanged for a note on one Odell.

In the bringing of the suits, giving of the new note by Estes, and the exchange of it for the Odell note, DeWolf and Chambers represented the appellee, and acted for her, with her knowledge, consent and request.

There is a conflict in the evidence of appellee, and DeWolf and Chambers, in relation to the Odell note; she testifying that her instructions to them were not to accept the note unless secured by mortgage; they disputing the part in relation to the mortgage. That, however, has only a remote bearing upon the case in hearing. So far as it has any bearing, it tends to show that appellee had adopted DeWolf and Chambers as her attorneys instead of appellant, and thereby waived any instructions given to him. After the receipt of the Odell note, appellee endorsed it to DeWolf and Chambers, as collateral security, for a loan of $40, and left it with them until 1876,

The same could not be said of the banker, express company or farmer. Shall this contract, then, be enforced as a contract with a lawyer, or as a contract with one of the other classes?

It is the province of the court to declare the meaning of the words of the instrument, and in order that this may be done, it is necessary to know in what capacity appellant contracted, and for this purpose it is competent to have resort to parol testimony.

"The legal effect of the instrument as between the parties thereto is not varied by this proof, but only the accountability of the defendant." Neither is anything added to the contract, so as to make it partially in parol. Abbott's Trial Ev. 280, 294; *Richards* v. *Millard*, 56 N. Y. 574; *Dana* v. *Fiedler*, 12 N. Y. 40; *Pollen* v. *LeRoy*, 30 N. Y. 549; *Bell* v. *Golding*, 27 Ind. 173. As bearing more or less directly upon the point here decided, see *Mace* v. *Jackson*, 38 Ind. 162; *Indiana Central Canal Co.* v. *State*, 53 Ind. 575; *Heath* v. *West*, 68 Ind. 548.

Appellant was not a lawyer, but, as we have said, the evidence tends to show that he represented to appellee that he was engaged in the practice of that profession with DeWolf and Chambers. It may be said, then, that he executed the contract as an attorney, and thereby assumed all the liability of an attorney which attaches under the contract. In receiving the due-bill as an attorney under the contract, the law implied, as a part of the contract, a promise on the part of appellant to exercise the care, diligence, knowledge and skill of an ordinarily prudent and competent attorney, and that he would at least pursue the ordinary remedies for collection, and, if need be, by suit and execution, and obey all proper instruction of his client in relation thereto, so long as he continued as such attorney. This agreement being implied by the law as a part of the written contract, the averment of it in the complaint, or the proof of it by oral testimony, added nothing to the contract or to the responsibility of the appellant. 2 Parsons Con., pp. 54, 515; *Reilly* v. *Cavanaugh*, 29

Ind. 435; Weeks Attorneys, section 259; *Walpole* v. *Carlisle*, 32 Ind. 415; *Skillen* v. *Wallace*, 36 Ind. 319; *Hillegass* v. *Bender*, 78 Ind. 225.

A failure in relation to any of these duties would constitute a breach of the contract, upon which an action might be predicated, and, being thus predicated upon a violation of the written contract, it would not be barred by the six years' limitation. If appellant is liable in this action, it must be for a violation of the written contract sued upon. He can not be held liable upon a contemporaneous verbal contract.

The *gravamen* of this action is the failure to attach the Estes lands before he had encumbered them with the mortgage, and the important question in the case is, was appellant's neglect in that regard such as to render him liable in damages?

While the contract imposed upon him the duty of skill and diligence as an attorney, it also imposed upon appellee the duty of co-operation, the furnishing of the necessary bond and the making of the necessary affidavit, if she wished a resort to the extraordinary remedy by attachment.

In the absence of instructions, it can not be said that it was the duty of appellant, under the contract, to institute attachment proceedings. Not only would an affidavit and bond be required in such proceedings, but the hazard of heavy loss upon the bond would be incurred.

It is possible to conceive of a case where a resort to such remedy might jeopardize, rather than expedite the collection. If such a case should occur, it might well be said that the attorney would render himself liable to his client for thus proceeding without instruction.

It is not the duty of attorneys to make affidavits in attachment proceedings. They sometimes do so, but the propriety of such course has always been doubted by the profession, and in some instances the *right* has been questioned.

Such a practice should be discouraged rather than imposed

as a duty. See *Abbott* v. *Zeigler*, 9 Ind. 511. It clearly would be unreasonable to hold that under a general employment, such as the contract in this case makes, it is the duty of the attorney to furnish a bond and incur the personal liability that might result therefrom.

The propriety of lawyers signing bonds for their clients has always been questioned, and many courts have adopted rules absolutely prohibiting it. See *Ohio, etc., R. W. Co.* v. *Hardy*, 64 Ind. 454. The employment and contract imposed no duty upon appellant to make and execute such affidavit and bond; nor would positive instructions from appellee requiring such services have imposed such duty.

The undertaking of the attorney is to perform such services as properly belongs to the profession; such as the client, for want of learning and skill, can not himself perform; but it does not require him to assume the burdens and risk of both attorney and client.

A proceeding by attachment is called an extraordinary remedy, yet, being auxiliary to the main action, so far as the services of an attorney may be required in such proceeding, they fall within the general employment in the main case.

In a proper case he may be made liable for a failure to prepare the proper affidavit and bond in attachment; for the failure to give proper advice, or the giving of erroneous advice in relation to such procedure.

The case in hearing, however, is not based upon a failure to advise, or upon an error in advising, appellee of her rights and the mode of procedure. She makes no such claim, either in her complaint or testimony, or that she had not full and ample information of what was required to institute the attachment proceedings.

Had she made such a claim, the case would be a different one from that before us. In the absence of such allegation and proof, we can not assume such ignorance on the part of appellee, or laches on the part of appellant. The claim is solely that appellant did not obey the instructions to attach the

land. Of course there could have been no attachment without the preparation of an affidavit and bond, but such preparation would have been utterly futile unless the affidavit should be sworn to and the bond executed. As it was the duty of appellee, and not of appellant, to verify the affidavit and execute the bond, and as she made no offer or effort to perform that duty, it is difficult to conceive how she can claim damages from appellant for a mere failure to write out the instruments. She occupies the attitude of asking damages for the violation of a contract which she had herself violated in reference to the same subject-matter. Her testimony shows that after she delivered the due-bill to appellant, she made no further calls upon him for about two years, and at no time offered, or showed her willingness or readiness, to make the affidavit or furnish the bond.

We are, therefore, of the opinion that she can not recover in this action. We suggest, without deciding, that whatever rights she may have had against appellant would have been waived by her subsequent conduct.

On the 16th day of March, after she had delivered the due-bill to appellant in February, she was at the office of DeWolf and Chambers, and under their advice, as her attorneys, commenced an action against Estes for the collection of the due-bill. At that time she made no mention of an attachment proceeding, although Estes still owned the land unincumbered. From that time forward, in the settlement with Estes, the surrender of the due-bill, the taking of a new note, the commencement of a new action, and the exchange for the Odell note, she recognized DeWolf and Chambers as her attorneys, and acted upon their advice, without consultation with, or reference to, appellant.

Upon the question of waiver, and as bearing somewhat remotely upon the waiver here suggested, see *Charlestown School Township* v. *Hay*, 74 Ind. 127; *Hunter* v. *Leavitt*, 36 Ind. 141; *Davar* v. *Cardwell*, 27 Ind. 478; *Parks* v. *Evansville, etc., R. R. Co.*, 23 Ind. 567; *Byrne* v. *Rising Sun Ins. Co.*, 20

Ind. 103; *Masonic, etc., Ass'n* v. *Beck*, 77 Ind. 203 (40 Am. R. 295).

Other questions are discussed with much ability and learning by counsel upon either side, but as they are subordinate to the question decided, we need not extend this opinion for an examination of them.

Judgment reversed, with costs, and cause remanded, with instructions to the trial court to sustain appellant's motion for a new trial.

NIBLACK, C. J., did not participate in the decision of this cause.

Filed Nov. 20, 1883.

No. 10,898.

## CAFFYN, AUDITOR, *v.* THE STATE, EX REL. RADER.

RAILROADS.—*Public Aid.—Taxes.—Statute Construed.*—Section 4062, R. S. 1881, so far as it provides for a forfeiture of taxes levied to aid in the construction of railroads, has been repealed.

SAME.—*Mandate.—Pleading.*—In an alternative writ of mandate to compel the auditor to place on the duplicate taxes levied in aid of a railroad, it is sufficient to aver as a fact that the railroad has been permanently located in the township, without alleging that the fact has been judicially determined.

SAME.—*Evidence.—Records.—Maps.*—A proper record of a county board, appropriating money to aid a railroad company named therein, and showing all the facts necessary to give jurisdiction, is sufficient evidence of the appropriation and of the corporate existence of the railroad company, in a proceeding by mandate to have the tax put upon the duplicate. So, that the railroad has been permanently located is sufficiently shown by the map and profile filed in the clerk's office, with proof of the actual construction of the road accordingly.

From the Fulton Circuit Court.

*J. Conner*, *G. W. Holman* and *M. L. Essick*, for appellant.

*L. P. Milligan* and *J. S. Slick*, for appellee.

BICKNELL, C. C.—This was an application for a writ of

mandate to require the appellant, as county auditor, to place on the tax duplicate of his county certain special taxes.

The petition was filed in September, 1882. It states that the plaintiff's relator is a resident freeholder and taxpayer of Rochester township, in said county; that on January 1st, 1879, the Chicago and Atlantic Railway Company was about to construct its railway through said Rochester township; that more than twenty-five freeholders of said township presented their petition to the county board of said county, for the appropriation to aid said railway company in the construction of its railway through said township, by taking stock in said company to the amount of $32,600, the same being less than two per cent. of the amount of property on the tax duplicate of said county for the year 1878; that the county board ordered an election to take the vote of said township, and that at such election a majority of votes were in favor of such appropriation; that the county board, at its regular session on June 6th, 1879, made an order that a special tax of $16,300, one-half the amount voted for, be levied to aid said railway company in the construction of its road in said township, and that no part of such levy be placed on the tax duplicate, or collected until the line of said railway be permanently located in said township, nor until the further order of the county board; that the county board, at its regular session on June 8th, 1880, made an order for the levy of the remaining half of the amount voted for, with the same provisos as in the first order; that said railway company began to build its road on January 1st, 1880, and permanently located the same through said township on September 1st, 1881, and has now, on September 2d, 1882, expended in the construction of its road in said township, a sum of money larger than the entire sum of said levies; that none of the taxes so levied have been placed on the tax duplicate for collection; that the defendant has failed and refused, and still refuses, to place any of said taxes on the tax duplicate for

collection, although specially requested thereto. Wherefore, etc. This petition was duly verified.

On September 7th, 1882, the Fulton Circuit Court awarded an alternative mandate, requiring the county auditor to place said taxes on the duplicate, or show cause why not. The foregoing petition was made a part of the writ.

The defendant appeared to the writ and demurred thereto for want of facts, etc.

Such a writ becomes the complaint, on which issues of law or fact may be made as in other cases. *Johnson* v. *Smith*, 64 Ind. 275; *Smith* v. *Johnson*, 69 Ind. 55. The demurrer was overruled. The defendant answered in three paragraphs:

1. That work on said railroad was not commenced in Fulton county within one year after the first of said levies.

2. That such work was not commenced in said county within a year after the second of said levies.

3. The general denial.

Demurrers to the first and second of these defences were sustained; a demurrer to said third defence was overruled. The issue was tried by a jury, who returned a general verdict for the petitioner. The defendant's motions for a new trial and in arrest of judgment were overruled. The court issued a peremptory mandate, requiring the defendant to forthwith place upon the duplicate said special taxes, and the court rendered a judgment for costs in favor of the petitioner. The defendant appealed. He assigns as errors—

1. Overruling the demurrer to the complaint.

2. Overruling the motion for a new trial.

3. Sustaining the demurrers to the first and second paragraphs of the answer.

The first objection made to the complaint is that it fails to contain any averment, that the railroad company began work upon its road in Fulton county within a year from the date of the levy of the taxes, and therefore shows upon its face that the rights of the company to the aid granted have been forfeited under section 18 of the act of May 12th, 1869, which

is the same as section 4062 of the R. S. of 1881. That section provides that "A failure on the part of the railroad company to commence work upon the railroad in said county within one year from the levying of such special tax, or failure to complete such railroad ready for use within three years from such levying, shall forfeit the rights of such company to such donation, unless the county commissioners, for good cause shown, shall give not to exceed one year's further time in which to complete the same."

The date of the levy is the date of the order therefor. *State, ex rel.*, v. *Wheadon*, 39 Ind. 520.

While section 18, *supra*, remained unqualified by subsequent legislation, it was held that upon such failure of the company, the taxpayers were discharged from their obligations to pay the tax. *State* v. *Wheadon, supra.*

So far as section 18, *supra*, established a forfeiture of the rights of the railroad company, it has been repealed by subsequent legislation. *Wilson* v. *Board, etc.*, 68 Ind. 507; *Board, etc.*, v. *Indianapolis, etc., R. W. Co.*, 89 Ind. 101. In the case last cited it was held applicable, while unrepealed, to donations only.

The complaint, therefore, was not insufficient for failing to aver that the road was commenced in the township, within a year after the levy of the taxes.

The only other objection urged against the complaint is that it does not show any sufficient determination of the fact that the road was permanently located in the township. The act of January 30th, 1873, R. S. 1881, section 4068, provides that "No tax shall be placed on the duplicate of any county, for the purpose of taking stock or making donations to railroad companies," etc., "until such railroad shall have been permanently located in the county or township making the donation or taking the stock." In pleading it is necessary to allege facts, and not the evidence which proves such facts. The complaint here alleges that the company's road "was permanently located through said township in September, 1881." This suit

was commenced in 1882. The complaint here shows that the fact exists which the statute makes a condition precedent to placing the tax on the duplicate. The demurrer admits that such fact exists. It is not necessary to aver that the facts which make it the duty of the auditor to place taxes upon the tax duplicate have been ascertained by judicial determination. There was no error in overruling the demurrer to the complaint, and there was no error in sustaining the demurrers to the first and second paragraphs of the defendant's answer. The cases of *Wilson* v. *Board, etc., supra*, and the *Board, etc.*, v. *Indianapolis, etc., R. W. Co., supra*, show that it was no defence to the complaint, that the road was not commenced in the county within a year after the levy.

The remaining error assigned is overruling the motion for a new trial.

The reasons for a new trial were:

1. The verdict is contrary to law.

2. The verdict is not supported by sufficient evidence.

3. The court erred in refusing instructions numbered 1 and 2 asked for by defendant.

4. The court erred in giving instructions numbered 1, 2, 3 and 4 of its own motion, and in giving each of said instructions.

No question is presented as to the refusal of the court to give the instructions asked for by the defendant, because they are not in the bill of exceptions, and are not in the record in any of the modes provided by law. *Jeffersonville, etc., R. R. Co.* v. *Cox*, 37 Ind. 325.

The only instructions given by the court which the appellant discusses in his brief are instruction No. 1, and subdivision 3 of instruction No. 2. These are as follows:

"Instruction No. 1. The defendant, having denied all the facts alleged by the plaintiff, has made it necessary that the plaintiff, in order to secure your verdict, should prove those facts; but the record of the board of commissioners, which

is in evidence, is, of itself, sufficient to prove that the board of commissioners of the county did make a valid levy of the tax alleged to have been levied, upon the taxables of Rochester township, to aid in the construction of the railroad named. The same record also established the existence of the railroad company as a corporation, and the appropriation of the sum of $32,600 by said township, for the purpose of such aid. It then became the duty of the defendant, as soon as the railroad was permanently located in the township, to place the tax so levied upon the tax duplicate, so that it might be collected. This was a duty imposed by law, and the board of commissioners had no authority whatever to direct him, as the record shows they did, not to perform that duty until they should so order; and, so far as the record shows they did so, he should have disregarded it, and he can not justify a neglect of his duty by reason of that direction."

Subdivision 3 of instruction No. 2 is as follows:

"The map and profile in evidence and the clerk's endorsement of the filing thereof are sufficient evidence of the permanent location of the road, if it appears by the evidence that the road has been actually constructed on the line shown by such map."

The statute, R. S. 1881, section 3902, provides that "Every such company, before proceeding to construct a part of its road into or through any county named in its articles of association, shall make a map and profile of the route intended to be adopted by such company; which shall be certified by a majority of the directors, and filed in the office of the clerk of such county, for the inspection and examination of all persons interested therein."

We perceive no error in these instructions. The appellant claims that instruction No. 1 is wrong because it informs the jury that the record of the commissioners establishes the corporate existence of the company and the fact of the appropriation. In this the appellant is clearly mistaken. *Board, etc.*, v. *Hall*, 70 Ind. 469.

As to the first and second reasons for a new trial, to wit, that the verdict was contrary to law and unsupported by sufficient evidence. This is not a proceeding to compel the payment to the company of the money appropriated. Its sole object is to require the tax to be placed upon the duplicate. For that purpose we think the evidence was clearly sufficient, and that the verdict was not contrary to law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Nov. 22, 1883.

91 330
143 219

No. 10,305.

## LEVI ET AL. *v.* ENGLE, ADMINISTRATOR.

PLEADING.—*Recovery of Real Estate.—Complaint.—Demurrer.*—In an action to recover the possession of real estate, the complaint is insufficient on demurrer, under section 1054, R. S. 1881, if it fails to show that the defendant unlawfully keeps the plaintiff out of possession.

SAME.—*New Parties.—Amendment of Complaint.*—Where, in the progress of a suit, new parties are admitted as defendants, it is incumbent on the plaintiff to amend his complaint by inserting therein the names of such new parties, and by making proper averments concerning them.

From the Ripley Circuit Court.

*E. P. Ferris, W. W. Spencer, J. S. Ferris* and *S. M. Jones*, for appellants.

*W. D. Willson, T. E. Willson, R. N. Lamb* and *A. L. Mason*, for appellee.

HOWK, J.—This suit was commenced on the 17th day of August, 1880, by the appellee, Engle, administrator with the will annexed, of the estate of William Graf, deceased, against the appellants, Samuel M. Jones, Isaac Levi, William Alex-

ander and John Baylor. The object of the suit was to recover the possession of lot No. 122, in the town of Osgood, in Ripley county, of which the appellee alleged that he was the owner in fee simple and entitled to the possession, and that the defendants had possession thereof, without right, and for one year had unlawfully kept appellee out of possession. Jones answered separately, that before the commencement of the suit he had sold and conveyed all his interest, legal and equitable, in the lot in controversy to Rhoda Levi, and disclaimed having any interest or estate in the property. Isaac Levi answered, setting up a contract with appellee's testator, William Graf, in his lifetime, for a specified part of the lot. Alexander and Baylor each answered that he was in possession of a part of the lot, as the tenant of Rhoda Levi, and disclaimed any other interest therein. Upon their joint affidavit of such tenancy, Alexander and Baylor moved the court that Rhoda Levi be made a defendant in this action, which motion was sustained; and thereupon Rhoda Levi appeared and answered. The cause was put at issue and tried by the court, and a finding was made for the appellee, except as to the part of the lot claimed by Isaac Levi, and judgment was rendered accordingly.

Rhoda Levi alone appeals to this court, her co-defendants below having appeared and declined to join in her appeal. The first error of which she complains is the overruling of her demurrer to appellee's complaint, for the want of sufficient facts therein to constitute a cause of action. In section 595 of the civil code of 1852, in force at the time (section 1054, R. S. 1881), it is provided that in an action to recover the possession of real estate, "The plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession." It is objected to the sufficiency of appellee's complaint in this case, that it is not stated therein that Rhoda Levi had

unlawfully kept the appellee out of possession of the lot in controversy, or any part thereof. This objection to the complaint seems to be well taken. Rhoda Levi was not a party to the suit when it was commenced; but afterwards, when the court ordered that she be made a party defendant, the appellee ought to have so amended his complaint as to state therein that she had unlawfully kept him out of possession of the lot, or of some part thereof. In *Vance* v. *Schroyer*, 77 Ind. 501, it was held, that where new parties are admitted into a case, the complaint must be amended by inserting their names therein and making proper averments concerning them. To the same effect, substantially, is the case of *McCarnan* v. *Cochran*, 57 Ind. 166.

We are of opinion, therefore, that the court erred in overruling the demurrer of Rhoda Levi to appellee's complaint. When the court ordered that she be made a party defendant in this action, the appellee did not amend his complaint, as he ought to have done, by inserting her name therein or otherwise, and did not aver that she had unlawfully kept him out of possession of the lot in controversy, or of some part thereof. For the want of such amendments the complaint did not state a cause of action against Rhoda Levi, and her demurrer thereto ought to have been sustained.

As the judgment must be reversed for the want of a sufficient complaint against Rhoda Levi, we need not now consider or decide any of the questions discussed by her counsel, arising under the alleged error of the court in overruling her motion for a new trial.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain Rhoda Levi's demurrer to the complaint, and for further proceedings.

Filed Nov. 20, 1883.

No. 8860.

91 333
150 547
152 181

# The Board of Commissioners of Greene County *v.* Huff et al.

Practice.—*Striking out Paragraph of Answer.—Harmless Error.*—It is harmless error to strike out a paragraph of answer, when all the facts admissible thereunder may be proved under the general denial which is filed.

Public Square.—*Definition.*—A public square in a county seat is understood to be the ground upon which the court-house and other public buildings are situated.

Same.—*Public Highway or Street Across Public Square.—Easement.—Dedication.—User.—Power of County Commissioners.*—Although land be set aside for a public square, the public may acquire a highway across such land by dedication, or by user for 20 years. The county commissioners may make such dedication. (As to what facts show the acquisition of such a public highway, see opinion.) *Sims* v. *City of Frankfort*, 79 Ind. 446, and *Indianapolis, etc., R. R. Co.* v. *Ross*, 47 Ind. 25, distinguished.

Same.—*Use of Such Way as Water-Way.*—The use of such a way as a water-way, if not incompatible with its use as a highway, will not operate to prevent the acquisition of the way by user as a highway.

From the Greene Circuit Court.

*A. G. Cavins, E. H. C. Cavins* and *W. H. Burk*, for appellant.

*W. I. Baker* and *L. Shaw*, for appellees.

Franklin, C.—This is a suit by appellees against appellant. The complaint is in two paragraphs.

The first paragraph is for a restraining order and an injunction to prevent appellant from erecting a fence across a public highway and water-way running over the south part of the public square of the town of Bloomfield, in said county, upon which public square is situated the court-house, jail and other public buildings.

The second paragraph alleged that the appellant had erected said fence across and had obstructed said public highway and water-way, and prayed to have the same abated as a nuisance, and that appellant be perpetually enjoined from again obstructing said highway and water-way, and for damages for obstructing the same.

A demurrer was overruled to the complaint.

Appellant answered in two paragraphs—a denial and a special defence. The second paragraph was, on motion of appellees, stricken out.

There was a trial by the court, and at the request of both the parties, a special finding was made and the conclusions of law stated thereon. Appellant excepted to the conclusions of law; and judgment was rendered thereon in favor of appellees.

The errors assigned in this court are:

1st. Error in overruling the demurrer to the complaint.

2d. Error in striking out second paragraph of answer.

3d. Error in the conclusions of law.

The second specification of error complained of was harmless. All the facts that could be given in evidence under the second paragraph of the answer were admissible under the general denial, which remained in.

The only questions presented and discussed by the parties are, can a public highway be created over any part of a public square, designated by the recorded plat of a town, as a public square? If so, was such highway established in this case?

As the same questions arise upon the conclusions of law as upon the demurrer to the complaint, and as the special findings state the facts fully, we think it best to refer to the facts first, which are, substantially, as follows:

In January, 1877, plaintiff Huff was the owner of the lot described in his complaint as being bounded on the south by Spring street, and on the west by Washington street in said town of Bloomfield, fronting twenty-six feet on said Washington street; that during the year 1877, he erected a large two-story brick business house thereon at a cost of $5,000, and that he has ever since owned and occupied said property and conducted the business of merchandising in the same; that at and ever since said time, plaintiff Hartsell has owned and occupied the lot described in his complaint as belonging to him, bounded on the east by said Washington street, and on the north by said Spring street, fronting sixty-six feet on

said Spring street, and that there then were and now are erected thereon a large hotel building and stables, and that the said Hartsell ever since has been carrying on the hotel business therein; that the land upon which the said town of Bloomfield is situated was sold to said county on the 22d day of April, 1824, and conveyed to an agent of said county; that the board of county commissioners caused the town to be then located as the county seat of said county, and the survey and plat thereof to be regularly recorded; that by said plat there was laid off and provided a public square for the erection thereon of a court-house, jail and other public buildings for the use of said county; that said square represented on said plat was and is bounded on the north by Main street, on the east by Washington street, on the south by Spring street, and on the west by Franklin street, each of said streets being of the width of sixty feet, and each side of said square 268 feet in length; that said square remained uninclosed until the 9th day of September, 1852, when the board of commissioners made an order of record for its enclosure, by which the fence was to be seventy-five feet from east, north and west sides of the court-house, and thirty-five feet from the south side of said court-house, and during that year the fence was built accordingly, placing a gate in the center of each side for an entrance to the court-house; by said fence the enclosure extended to the line of said public square on the east, north and west sides, and left seventy-five feet on the south side of said square uninclosed, which fence has so remained and been maintained ever since, up to the 9th day of March, 1880, leaving all of said time the said strip on the south side of said square unenclosed; that the soil of all of said square, and for a long distance south of the same, as well as east and west of the same, including the territory occupied by the said hotel of the plaintiff Hartsell and the said business house of the plaintiff Huff, is composed of loose sand, easily moved by the force of water; that the surface drainage of the east and north portions of said town all tends toward

said public square, and a considerable portion of it accelerated by a very considerable inclination of the ground toward said square, so that in heavy rains large quantities of such drainage are brought down said Spring, Washington and Franklin streets; that at the time said town was laid out there was a hollow of considerable depth having its origin in a point near the central portion of the southern boundary of said square in Spring street as said street is represented on said plat of said town, and extending south through the southern boundary of said town, more than a quarter of a mile. This was then, and ever since has been, of such depth as to render said Spring street impassable at said point, and to prevent travel upon all cross streets between Washington and Franklin streets south of the origin of said hollow; that this hollow, at the time of the laying out of said town, was, at its northern extremity or origin, of no considerable width, but for fifty years last past the action of the surface drainage in wearing away the banks thereof has so increased the same that it has extended westward so as to encroach upon and destroy half of the width of said Franklin street from the center of Spring street south, and has extended east to the northern prolongation of the western line of said Hartsell's hotel, which line is sixty-six feet west of the western line of said Washington street; and has also by like gradual encroachments extended northward, so that at the beginning of this action, its northern boundary, somewhat irregular in form, is about forty feet north of the southern boundary of said public square, as defined by said plat of the town, and said northern line of said hollow, is within said platted boundary of said public square from a point seventy-five feet west of the east boundary of said square to the western boundary thereof; that during all the time said square was uninclosed, the public continuously and daily used as many as three well defined routes for travel and highway purposes across the territory of said square as originally platted; that one of these routes was somewhat circular in shape and lay north and around the head of said

hollow, and through and across the southern portion of said plat of said square and formed the connection between the east and west ends of said Spring street, where said street is broken by said hollow; that the travel on said route has at all times been very considerable, it being the shortest line of travel between said east and west portions of said town lying south of said public square, and being the only road south of said square which could or can be travelled between said Washington and Franklin streets; that this route, on the 9th day of March last, and for more than twenty-five years prior thereto, was on and over the narrow strip of ground lying between the northern boundary of said hollow and the said south fence of the public square, and was about an average width of twenty-five feet, except at the east end thereof, where it extends south for a distance of seventy-five feet, it being the space lying east of the eastern bank of said hollow and between that and said Washington street. All of which space south of the fence of said square the public during all of said time were accustomed to, and habitually did, travel over; that said fence was originally built and has ever since been maintained at the north edge of said travelled way, and was so built and maintained for the purpose of allowing the public to travel on said route between said Washington and Franklin streets.

In the beginning of the travel around the head of the hollow the road was some twenty-five feet south of its present line, and in more of a circular shape, which space is now mostly occupied by the hollow. The road was gradually pushed to the north by the encroachments of the hollow, but for more than twenty-five years last past has held and occupied the present place, by greater vigilance being exerted in preventing the further breaking in of the bank of the hollow, and during all that time has been daily and continuously used by the public as a highway, without objection from said board, and without asking or obtaining permission from said board;

that ever since the laying out of said square the commissioners of the county have from time to time expended money and labor in the preservation and protection of the banks of said hollow, by building dams, embankments, planting trees, and filling in with earth and other materials for that purpose; the travelled line north of said banks being all the time left open, it being all the time necessary to preserve and protect said banks in order to insure the safety of the court-house and other public buildings; that in the year 1838 the road hands of the district were called out by the supervisor, and they, with the citizens generally, worked a day or two on the banks of said hollow to protect the same, the said hands receiving credit therefor as work done on the highways; no other work has been done thereon by the public; that its banks have been protected by the county commissioners, except as aforesaid; that upon two or three occasions in the last twenty years sudden descents of rain have caused breaches in said banks, extending into said road so as to materially but not entirely obstruct travel thereon, which were repaired by the county, the road supervisor refusing to do so; at other times holes were washed out in the road, and the safety of the embankments threatened thereby, which were repaired by the county's agent; that in order to protect the banks of the hollow the county, at a large expense, constructed a large and lengthy channel or flume, paved with stones, beginning at the northwest part of the hollow, near the intersection of the road in question with Franklin street, and leading down the bank into the hollow in question; that the water flowing down Washington street from the north, and Spring street from the east, has for fifteen years last past been collected so as to flow into the road in question at its eastern end, and flow west along and over said road to said channel or flume, where it united with the water flowing down Franklin street from the north, and all passed off down said flume into the hollow; that embankments were maintained for the purpose of collecting said surface water at the head of said flume, so that it might pass off

into the hollow without wearing away the banks thereof; that on the 9th day of March, 1880, appellant, by order of record, caused its agent to erect a fence on the line of the original plat of said public square, enclosing said south side thereof, which up to that time had remained unenclosed and used as aforesaid, thereby obstructing all travel along and over the road in controversy; that said fence has been ever since and now is so maintained, and thereby prevented the flow of said surface water from said Washington and Spring streets into said road, and over the same to the head of said flume; and said obstruction to said flow of water so remained until the commencement of this action, and until the 22d day of March, 1880, when the road supervisor opened the same so as to let the water flow under said fence and pass over said road; that the permanent maintenance of the fence across said road would materially impair the convenience of access on the part of a considerable number of those who have been accustomed to patronize the hotel of plaintiff Hartsell and the store of plaintiff Huff, and would injure the trade of both of said plaintiffs; and that by the erecting and maintaining of said fence, said Huff has been damaged by loss of trade in the sum of $5; and said Hartsell has also been damaged in the sum of $5; that by the maintenance of said fence permanently as aforesaid, the said property of the said Huff will be injured in value $500, and said property of said Hartsell in the sum of $300; that by preventing the flow of the said surface water along and over said road as aforesaid, in the manner in which the same was obstructed as aforesaid, and opening no new channel therefor, the same would flow upon the said Hartsell property and endanger the foundation thereof and damage the same very greatly; that no petition or other proceeding for the vacation of said road in controversy has ever been introduced or filed before said board of commissioners.

We have thus fully stated the substance of the special findings of the court, which fully state the facts, in order to

comprehend the questions arising upon the exceptions to the conclusions of law, as well as the demurrer to the complaint.

As conclusions of law the court substantially stated:

1st. That the road in controversy is a lawful public highway.

2d. That the obstruction of the same by the defendant was without authority of law, and was illegal and wrongful as against the public and the plaintiffs.

3d. That the plaintiffs have a right to maintain this suit and recover for the injuries, etc.

4th. That they ought to recover the damages, etc., which they have sustained, as named in findings.

A public square, in a county seat, is understood to be the ground upon which the court-house and other public buildings are situated. *Westfall* v. *Hunt*, 8 Ind. 174. And the designation of a piece of ground in the recorded plat of a town as a public square, does not make it so, unless it is accepted and used as such. *Westfall* v. *Hunt, supra.*

A public highway is a way over which all persons have a right to pass; and that right may be acquired, among other ways, by the dedication of the owner of the soil, or by the uninterrupted user of the public for twenty years.

The said town of Bloomfield was located as the county seat of Greene county, Indiana, on a tract of land purchased by the county. The commissioners thereof caused the town to be platted and the plat recorded, in which the public square in controversy was designated; and as the agents of the county, being the custodians of its property, they caused a court-house and other public buildings to be erected on said public square. This square remained unenclosed until the year 1852, twenty-eight years, and in the meantime the public had established a well defined way of travel around the head of said hollow, and across the south end of said public square. When said commissioners enclosed so much of said public square as aforesaid, as was thought needful for the use of the public buildings thereon situated, the court specially found that, for the purpose of leaving a pass-way around

the head of said hollow, they left the remainder of said platted public square unenclosed, in which condition it remained until the spring of 1880, the public all the time using it as a public highway.

Do these facts establish an express dedication from the owner, or a presumptive dedication by user for twenty years, or any right whatever for all persons to travel over said way?

It is insisted by appellant's counsel that, as a matter of law, a public highway can not be established across any part of the public square, because it had already been set apart for a public purpose, and that a right therein can not be dedicated to, or acquired by, the public for any other purpose.

The question is presented more fully by the exceptions to the conclusions of law than the demurrer to the complaint.

The direct averment in the complaint, that there was a highway there, and that it had existed for more than twenty years, so far as this question is concerned, and no other is presented or discussed in the case, is sufficient to make the complaint withstand a demurrer; under it the plaintiffs could prove the establishment of the right of way by any of the means known to the law. *Jackson* v. *Smiley*, 18 Ind. 247.

The length of the complaint appears to have been required in order to state all the facts in detail with their surroundings, for the purpose of establishing special damages to enable the plaintiffs to maintain the suit. Nominal damages were found, to test the question.

The facts found by the court establish beyond controversy that the public had continuously, without interruption, used the road in dispute as a highway for more than twenty-five years preceding the obstruction complained of, with the knowledge of and without any objection from appellant. Its proximity to the court-house, and running between the court-house and the head of the hollow, the banks of which appellant was assiduous in protecting from further wash, in order to preserve the public buildings, render it impossible for appellant to have been ignorant of its use by the public as a highway.

If the easement of a public highway can be established by user over a public square, the provisions of the 5035th section of the R. S. 1881 have been complied with, which section reads as follows: "All public highways which have been or may hereafter be used as such for twenty years or more shall be deemed public highways." In this statute there is no exception in favor of public grounds.

In the case of *Hart* v. *Trustees, etc.*, 15 Ind. 226, it was held upon a special finding of the court, that the uninterrupted use of a road by the public continuously for twenty years constituted it a public highway of an undefined width, and it was limited to the width it occupied at the end of the twenty years. And to the same effect is the case of *Epler* v. *Niman*, 5 Ind. 459.

In the case of *State* v. *Hill*, 10 Ind. 219, it was held that a less period—even four or five years—was sufficient to raise a presumption of dedication. And it is therein further added: "Indeed, the weight of authority seems to be, that the use of land for a highway for such a length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, would be evidence that the owner intended a dedication to the public. *Jarvis* v. *Dean*, 3 Bingh. 447; 2 Greenl. Ev., section 662." *Fisher* v. *Hobbs*, 42 Ind. 276.

There are facts also found by the court which tend strongly to show that appellant intended to dedicate the ground in dispute to the public for a highway. It laid off the public square with a street and public highway on each side of it for convenient access to the court-house and other public buildings to be situated thereon. Spring street, upon the south side thereof, was impassable, and continued for twenty-eight years to get worse, by which time three well defined public roads were used over said public square. Appellant then, in 1852, fenced two of them up, and left the one in dispute open as the only means of a street and public highway on the south side of said public square. And the court further finds that

appellant left said road uninclosed outside of the fence on the south side of said public square for the purpose of its being used as a public highway, thereby, so far as it could, dedicating said ground to the public as a highway, and which was accepted and used as such continuously, and without objection or interruption, for the succeeding twenty-five years, and until the time of the obstruction complained of. Is this sufficient? See *Hays* v. *State*, 8 Ind. 425; *Summers* v. *State*, 51 Ind. 201.

In the latter case, it was held that a public highway may be established by "dedication arising by presumption from a continued use of the place for a considerable period of time by the public as a public highway, with a knowledge thereof by the owner, and without objection on his part," meaning, doubtless, for a period of time much less than twenty years; for, in the former case, it was held that twenty years user of a road as a public highway is, under the statute, an absolute bar; and, in the latter case, it was further held that "the continued use of it by the public for a considerable length of time is sufficient evidence of acceptance on the part of the public." This does not require the road to be worked by the public.

To constitute a highway by user, the use must not only be uninterrupted and continuous for twenty years, and with the knowledge of the owner of the land over which it passes, but must be by his consent, or without his objection. *Sullivan* v. *State*, 52 Ind. 309; *Summers* v. *State*, *supra*.

"It is a general rule that to constitute a valid common-law dedication, there must be an intention to dedicate, and an act on the part of the owner, and an acceptance on the part of the public. This general rule is, however, subject to modification, that if the owner of a servient estate intentionally or by gross negligence leads the public to believe that he has dedicated the premises to public use, he will be estopped from denying the dedication to the prejudice of those whom he may have misled." Herman Estop., section 521; *City of Co-*

*lumbus* v. *Dahn*, 36 Ind. 330; *Wilder* v. *City of St. Paul*, 12 Minn. 192; *Mansur* v. *State*, 60 Ind. 357; *Mauck* v. *State*, 66 Ind. 177.

In the last case referred to the following language is used: "The unopposed use by the public of a road over the land of an individual who is cognizant of the fact, for a period of twenty years, would give the public an absolute right against such individual to have such road kept open for the use of the public."

In the case at bar, the court found that there was an intention on the part of appellant to dedicate, that there was an act of dedication by fencing up the balance of the public square and leaving the road unenclosed, and that there was an acceptance by the public by a continuous and uninterrupted user for more than twenty-five years, and that public accommodation and private rights would be materially affected by an obstruction of the highway.

Appellant's counsel insist that it used the road as a water-way, and that no use of it by the public as a highway could establish it as a highway. True, appellant used it for fifteen years last past as a water-way, and occasionally repaired it to preserve the banks of the hollow, but that use of it in no way interfered with the use of it, at the same time, as a public highway. It rather appears that appellant has been using a public highway as a water-way, instead of the public using a water-way as a public highway; the original and primary use was as a road, the use as a water-way being incidental. Public streets, as highways in towns and cities, are universally used as water-ways. But it certainly can not be correctly said that such use of them destroys or vacates their use as public highways, or in any manner interferes therewith.

The land upon which the town was located belongs to the county; appellant as its agent had the charge and management of the public square, and had the right to appropriate any part of it to any public use consistent with the necessities and

convenience of the public buildings thereon situated. 1 R. S. 1876, p. 352, sec. 13. *Hayward* v. *Davidson*, 41 Ind. 212; *Haag* v. *Board, etc.*, 60 Ind. 511 (28 Am. R. 654).

Then, could appellant dedicate the premises to the public to be used as a highway, or could the public acquire such easement by user for twenty years?

The case of *Prudden* v. *Lindsley*, 29 N. J. Eq. 615, is somewhat similar to the one under consideration, and, we think, in point upon these questions. That was a proceeding by injunction to prevent the obstruction of a highway over public grounds. And in that case the court held that the trustees were the legal owners of the land, and a discretion was vested in the trustees as to how it should be made to best subserve the purpose intended; and in the range of this discretion their acts were lawful and binding; and if the highway claimed by the complainant could be laid out by the trustees in furtherance of their trust, then their dedication is valid. *Rex* v. *Leake*, 5 B. & Ad. 469. And the court further adds: "It can not be asserted, as a principle of law, that the devotion of part of a school plot to the purposes of a highway, is inconsistent with the trusts impressed upon it, for, manifestly, circumstances may be imagined where a public road would be convenient, or even necessary, for the enjoyment of the school; and, therefore, the question whether such dedication can be made, is one of fact, to be determined by the conditions of each case." And again, on p. 618: "A stranger, by an adverse possession as against a trustee, continued for the requisite period of time, may bar both the legal estate of the trustee and the equitable interest of the *cestui que trust*. 3 Washb. Real Property 163. * * * That the original trusts were in favor of the public, or a part of it, can not prevent the effect of the prescription. The power of the public to impress a particular use on its own property would seem to be less deniable than its power so to affect private estates. If the earlier and the later public easements are consistent,

then the first interposes no obstacle to the acquisition and enjoyment of the second; if they are inconsistent, the use of the one and disuse of the other continuously for twenty years, must indicate the public election which to enjoy. * * * Therefore an uninterrupted and adverse public use of the highway for over twenty years would establish the easement, notwithstanding the prior trust."

In the case of *Tyler* v. *Wilkinson*, 4 Mason C. C. 397, STORY, J., said: "By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. * * * The presumption is applied as a presumption *juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law."

On the question of acceptance there is a distinction recognized by Greenleaf on Evidence, vol. 2, section 662, where it is said: "It does not follow, however, that, because there is a dedication of a public way by the owner of the soil, and the public use it, the town or parish or county is therefore bound to repair. To bind the corporate body to this extent, it is said that there must be some evidence of acquiescence or adoption by the corporation itself." And this explains a number of the authorities saying that the dedication must be accepted by some constituted authority. This is only necessary when questions of liability to repair are involved.

No question of fact is found by the court having a tendency to rebut the presumption of dedication.

In the case of *Sims* v. *City of Frankfort*, 79 Ind. 446, it was held that a private individual could not acquire a title to a part of a public street by mere permissive possession for twenty years; and the following quotation is approvingly made from Judge Dillon's work on Municipal Corporations: "As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall

within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and can not alien public streets or places, and no laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found, that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments."

It was further held, in said case, that "There can be no permanent rightful private possession of a public street. The obstruction of a public street is a nuisance, and as such is punishable by indictment. * * No man can acquire a right to maintain a public nuisance by prescription. Each day's continuance of a nuisance may be an indictable offence."

In that case the appellant had built his front fence out a little upon the street, at a cost of $35, and had constructed a pavement in front thereof, and the court, in discussing the question of estoppel, held that the line of his fence was not established by the corporate authorities, but had been fixed by appellant, and therefore he could not have been misled by the municipality in that respect. "Acting under leave and license is very far from acting under orders or directions. The question whether there can in any case be an equitable estoppel by the mere passive inaction of the municipal officers is a very doubtful one. We need not here discuss or decide it. * * * He can not by such an improvement as that shown in his complaint acquire title to a public street. * * * Whatever may be the rule where it appears that great expenditures have been made and acts done for which compensation can not be fully made, it is plain that where

there has been a small expenditure of money for which full compensation can readily be made, title can not be acquired in a public highway by estoppel."

We think the case under consideration differs very materially and is easily distinguished from the aforesaid case.

Here a private individual is not seeking to acquire title to, or to occupy any part of, the public grounds. Appellants are only seeking the right for the public to use, as a public highway and water-way, that part of the public grounds which the municipal authorities had more than twenty years previously set apart for such purposes, and which had been, for that time, so used by the public and kept in repair by said municipal authorities.

While it is a correct principle of law that municipalities, while in the discharge of public trusts, are not bound by the ordinary statutes of limitation, so that a private individual can, by their laches, acquire by user a fee simple title to public property under their charge, and, perhaps, that they could not by grant alien or convey such public property to be used for individual purposes, still they have the control, to some extent, as to how such property shall be used for public purposes. The corporate authorities of a town or city have the right to grant the right of way over public streets to regular railways, or street railways, as quasi-public institutions, as against the ordinary use of such streets by the public as public highways, but not a fee simple therein as against the abutting lot-owners who own the fee simple to the center of the streets. And when these rights of way are once regularly granted by the proper authorities, and investments have been made upon the faith of such grants, these same authorities can not revoke such grants and stop such use of such public streets; and the continuous user of such streets for such purposes for twenty years, or even a shorter period, would be evidence of such grants, and strengthen the claim thereto.

In the case of the *Indianapolis, etc., R. R. Co.* v. *Ross*, 47 Ind. 25, where the railroad company was sued for an assess-

ment for the improvement of a street, it claimed a fee simple by user in the part of the side of the street occupied by the company; this court held that it could not, by user, acquire a fee simple title to any part of a public street. But the court further said: "Were it a question whether, by the use alleged, the company had acquired a right of way, a different point would be presented."

In the case at bar, the county is the owner in fee simple of the public square, and that fee simple extends to the center of the streets on each side thereof. And while it is dedicated to the use of the public for a county seat, its agent, the board of commissioners, has charge of the manner in which it shall be used by the public, consistent with the object of its dedication. Hence they erected near the center of it a court-house, on the east part a jail and sheriff's residence, on the north a public well, on the southeast a coal and wood-house, and enclosed by a fence as much of it as they thought necessary for the convenience of the public buildings and the ornamentation of the grounds. The plat of dedication shows that it was the original intention to have a street and public highway on each side of said public square. The street on the south being impassable, the commissioners, when they enclosed the square, left a space on the south side unenclosed, to be used as a public highway and water-way, in the place of said impassable street. They placed a gate in the center on each side of the public square as the means of access to the court-house and other public buildings; and the improvements of the town have been made in reference to this condition of the public square. Now, after so long a user and large investments upon the faith of the right thereof, have the commissioners, without making Spring street passable and furnishing a safe water-way to dispose of the surplus surface water, the right to close up the highway and water-way on the south side of the public square, to the great damage and injury of adjacent property owners?

The public highways around the square, and for foot pas-

sengers across the enclosed square from the gates in the center of the sides to the court-house and other public buildings, are necessary conveniences, in order to have access to the public buildings by the public, and no less so on the south side than either of the other sides.

We think the public has elected, by the acts of the commissioners and the acceptance of the public, that this part of the platted public square should be appropriated to the public use, and that said use is not inconsistent, but in perfect harmony, with the use of the square as a county seat, and that this case falls within the rule laid down in the New Jersey case, *supra*.

If the public and the appellees have not acquired an absolute technical right by prescription or grant, such investments and improvements have been made that a closing of said highway and water-way would work great damage and injury to appellees and the public, for which compensation could not readily be made without improving Spring street so as to make it passable, and furnishing a sufficient water-way. We think the case also comes within the rule laid down by Judge DILLON, *supra*, " that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public." And we do not think that this conclusion is in conflict with the principles held in the case of *Sims* v. *City of Frankfort*, *supra*.

The court below did not err in its conclusions of law. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is in all things affirmed, with costs.

Filed Nov. 22, 1883.

No. 10,865.

91 351
150 464
151 561
151 691
152 483
91 351
153 442
91 351
154 647

## THE STATE, EX REL. AULT, *v.* LONG.

OFFICE AND OFFICER.—*Information for Usurping Office.—Eligibility of Relator.—Demurrer.*—An information for usurping an elective public office, filed on the relation of one claiming the office by election, is bad on demurrer, if it fail to show that such relator is eligible to the office.

SAME.—*County Recorder.—Term of Office.—Filling Vacancy by Appointment of One Who Had Theretofore Been Elected to Succeeding Term.—Statute Construed.*—A. was elected county recorder at the October election, held in 1878, to fill the four years term commencing November 1st, 1879, and ending November 1st, 1883. B.'s term of office of four years commenced November 1st, 1875, and ended November 1st, 1879; B. resigned November 4th, 1878, and A. was appointed to fill B.'s unexpired term. November 1st, 1879, A. entered upon the term for which he was elected. C. was elected as A.'s successor at the election held November 7th, 1882, and thereupon claimed that A.'s term of office commenced immediately upon the resignation of B., and expired at the end of four years from that date.

*Held*, that the resignation of B. created a vacancy, and that the appointment of A. to fill such vacancy did not alter the length of the term for which he was elected, commencing on the 1st day of November, 1879.

From the Tipton Circuit Court.

*J. T. Cox, M. F. Cox* and *J. M. Fippen*, for appellant.

*D. Waugh, J. P. Kemp, R. B. Beauchamp* and *G. H. Gifford*, for appellee.

BLACK, C.—This was an information under the statute, on the relation of Jesse Ault, against the appellee, John Long, charging him with unlawfully holding against the relator the office of recorder of Tipton county.

The answer of the appellee was, in substance, as follows: At the general election held in said county on the second Tuesday in October, 1874, one Archibald E. Small was duly elected to the office of recorder of said county for the term of office commencing on the 1st of November, 1875, and ending on the 1st of November, 1879. In pursuance of said election he was, by the Governor of the State of Indiana, duly commissioned as such recorder, for said term for which he had been

so elected; and he duly qualified and entered upon the discharge of his duties as such recorder under his said election and commission, at the commencement of his said term of office. At the general election held in said county on the second Tuesday of October, 1878, the appellee, being a resident of said county and eligible to said office, was duly elected to said office by a majority of all the legal votes cast at said election, for the term commencing at the expiration of the term of said Small, November 1st, 1879, and ending on the 1st of November, 1883. In pursuance of his said election the appellee was, by the Governor of the State of Indiana, duly commissioned to said office for the term to which he had been elected, commencing and ending as aforesaid.

On the 4th of November, 1878, said Small, who, until that time, from the commencement of his term as aforesaid, had continued to hold said office and to perform its duties under his said election and commission, resigned his office as recorder of said county, thereby creating a vacancy in said office, whereupon, on the same day, the board of commissioners of said county duly appointed the appellee to fill the vacancy in said office occasioned by the resignation of said Small as aforesaid; and thereupon the Governor of the State of Indiana, in pursuance of said appointment, duly commissioned the appellee as such appointed recorder to fill the vacancy in said office occasioned by said resignation, from said 4th of November, 1878, on which day the appellee duly qualified and entered upon the discharge of the duties of said office in good faith, under his said appointment and commission, and not otherwise. He continued to hold and fill said office in good faith, under his said appointment and commission, and not otherwise, up to the 1st of November, 1879, the time of the commencement of the term of office to which he had been elected and commissioned by his commission to the term of office to which he had been elected. On that day he duly executed his bond as required by law as such recorder, for the term

to which he had been elected, and said bond was duly approved by the board of commissioners of said county, and thereupon the appellee duly qualified and entered upon the discharge of the duties of said office, under his said election and commission, and for the term to which he had been elected as aforesaid, and not otherwise. He duly qualified and entered upon the discharge of the duties of said office within ten days of the receipt of his commission and commencement of the term of office to which he had been elected as aforesaid, and thereafter he continued to hold said office, and still held it at the commencement of this proceeding; and in his said answer he claimed that he was entitled to continue to hold under his said election and commission until the 1st of November, 1883. It was further alleged that the relator was elected to the office of recorder of said county at the general election held in said county on the 7th of November, 1882, to succeed the appellee in his term of office under his said election and commission, "that is to say, the relator was elected as recorder for the term of office commencing at the expiration" of the appellee's term of office under his said election, as aforesaid, and not otherwise; that the relator, in pursuance of his said election, was duly commissioned, by the Governor of the State of Indiana, to said office, for the term commencing on the 1st of November, 1883; that on the 6th of February, 1883, the relator was duly qualified as such recorder, under his said election and commission, and not otherwise, "and is now demanding and claiming the title to said office. Defendant states the truth to be that the relator's pretended claim to said office at this time is based upon no other facts or consideration than as herein stated. Wherefore he says he is entitled to hold and enjoy the possession and emoluments of said office until the expiration of the term to which he was elected, and demands judgment for his costs."

A demurrer to the answer was overruled, and upon refusal of the plaintiff to plead further, judgment was rendered for

the defendant. The ruling upon the demurrer to the answer has been assigned as error.

The information was insufficient; it did not either aver that the relator was eligible to said office, or state facts showing his eligibility. The omission of such an averment did not merely render the information uncertain or indefinite, so that a motion to make it more specific in its averments would have been an appropriate remedy. The averment of a necessary fact was wholly omitted. *Reynolds* v. *State, ex rel.*, 61 Ind. 392; *State, ex rel.*, v. *Bieler*, 87 Ind. 320. This being true, the information was not cured by the answer, which contained no averment in regard to the eligibility of the relator. Whether the information was otherwise insufficient, as suggested by counsel for the appellee, we need not decide. In view of the insufficiency which we have mentioned, it could not have been error to overrule the demurrer to the answer.

But we have been earnestly requested to examine and decide upon the merits of the real controversy between the parties. The answer was pleaded as a defence, and not as a counter-claim. Among the averments of the information, it was alleged that at the general election held in said county in 1878, the appellee was duly elected, by a majority of all the legal and qualified voters of said county, to the office of recorder in and for said county, for the term of four years. It was also alleged that at the general election held in said county on the 7th of November, 1882, the relator was duly elected by a majority of all the legal and qualified voters of said county, to said office of recorder in and for said county, for the term of four years. The controversy between the parties is not intended by either of them to involve any question as to the legality of the election of the appellee in 1878, or of that of the relator in 1882. The real controversy concerns the effect of Small's resignation upon the term of office to which the appellee was elected in 1878, and we think the merits of this question are with the appellee.

It is contended, on behalf of the relator, that as the appel-

lee was elected before Small resigned, the resignation did not produce a vacancy which could be filled by appointment; that the appellee's term of office under his election then commenced, and he was entitled to the office under his election, and could take it then only by virtue of his election; that he derived no right under said appointment, and was entitled to hold the office for only four years from the 4th of November, 1878, and until his successor was elected and qualified.

Section 2 of article 6 of the Constitution of this State provides that there shall be elected in each county, by the voters thereof, at the time of holding general elections, a recorder, who shall continue in office four years. The ninth section of the same article provides that vacancies in county offices shall be filled in such manner as may be prescribed by law.

The Constitution, article 2, section 14, until that section was amended in 1881, provided that all general elections should be held on the second Tuesday in October. The section, as amended, provides that all general elections shall be held on the first Tuesday after the first Monday in November.

An act of 1869 (Reg. Sess. 57, sec. 1, 1 R. S. 1876, p. 436) provided for the holding of a general election on the second Tuesday of October, 1870, and every second year thereafter, at which all existing vacancies in office, and all offices the terms of which would expire before the next general election thereafter, should be filled, unless otherwise provided by law.

A statute of 1881 (R. S. 1881, sec. 4678) provides, in conformity with said amendment of the Constitution, for the holding of a general election on the first Tuesday after the first Monday in November, in 1882, and biennially thereafter on the same day, at which all existing vacancies in office and all offices the terms of which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law.

Section 5929, R. S. 1881, enacted in 1852, provides as follows: "At the general election immediately preceding the expiration of the terms of office of the present incumbents,

and every four years thereafter, there shall be elected in each county a recorder, who shall give bond in the penal sum of two thousand dollars."

Section 5563, R. S. 1881, enacted in 1852, provides that the board of county commissioners shall fill vacancies in county offices, and that "such appointment shall expire when a successor is elected and qualified, who shall be elected at the next" general election proper to elect such officers.

It is the general policy of the law that the elective offices shall have consecutive terms, the duration of which shall be as certain as may be; that when this regular order is broken by a vacancy, the office in which it occurs shall not remain unfilled longer than necessary, but such offices, as far as is possible without disturbance of the regular system of elections, shall be bestowed upon the incumbents by the voters, and an office shall be filled by appointment only until the voters can themselves fill it at a regular election, and when they have thus filled it, the regular order of definite, consecutive terms is restored; and whenever the people by general election bestow an office, the term of which is fixed by the Constitution, it is for such full, regular term thereof, which is one contemplated by the electors when they vote, the future time at which the person elected may qualify and assume his duties as a public servant not being left to accident or caprice, but being ascertained when the election takes place.

When the general election was held on the second Tuesday of October, 1878, there was no existing vacancy in the office of recorder of said county, but a term of office created by the election of Small would expire before the next general election thereafter, to be held in 1880, by the ending, on the 1st of November, 1879, of the four years for which Small was elected. It was the general election immediately preceding the expiration of the term of office of an elected incumbent. It seems plain that said section 1 of said act of 1869, and said section 5929, R. S. 1881, when applied to a case where the office of county recorder is held at the time of

a general election, not by appointment, but through an election, refer to the expiration of four years from the commencement of the term of such incumbent.

If, at the time of the general election of 1878, Small were holding by appointment, it would have been proper to elect his successor at that election, and Small's term by appointment would have expired, without his resignation, when a successor elected at that election should have qualified.

Under the actual circumstances, it was proper to elect Small's successor at that election only because Small's term of four years would expire at a then ascertained time before the next general election. Long's election gave him no right to the office until the expiration of the period for which Small had been elected. The person elected to such an office is required to give bond "within ten days after the commencement of his term of office and receipt of his commission," or the office will be vacant. R. S. 1881, section 5527. The term of office, the commencement of which is here referred to, evidently is the term for which such person is elected. During the interval between his election and the commencement of the term for which he is elected, he is not obliged to be present and keep watch and be prepared to enter on the duties of the office and to give bond, in case the incumbent entitled to hold the office during that interval should at any time in the interval vacate the office. The term for which Long was elected could not be changed by any act of Small. His resignation ended his incumbency, but it could not confer the remainder of his term upon Long or any other person.

It is contended that the law authorizing the board of commissioners to make appointments can not be applied to such a case. As the statute provides that an "appointment shall expire when a successor is elected and qualified, who shall be elected at the next" general election, it is insisted that if the appellee derived title to the office by virtue of the appointment, he would hold under the appointment until the next general election, in 1880, and that then his successor should have been

elected, and the appellee would never have been allowed to hold the office under his election.

It must be admitted that this would be, as the learned counsel for the appellant call it, an absurd consequence.

The absurdity is avoided by construing the particular provision in view of the general policy of the law. Under the general system, Small's resignation created a vacancy, to fill which Long had not been elected. The statute authorized the board to fill all vacancies in county offices. The board might, therefore, fill this vacancy by the appointment of Long or any other eligible person. The further purpose of the statute is to permit the voters of the county to fill the office by election at the earliest time at which it is possible for them to do so at a general election. But if the appointee's successor be already elected at such an election, no election of a successor is needed to give the voters an opportunity to express their choice; and it is not the policy of the law that an appointment shall interfere with the choice of the voters expressed at an election, and such choice will not be interfered with if the appointee hold till the time for the commencement of the term of office already conferred by the voters has arrived and the person already elected has qualified. But that choice would be interfered with if the term given to one person by the voters might be changed by the resignation of another person.

It is in harmony with this statute, taken in connection with other statutory and constitutional provisions on the subject, to say that where a vacancy occurs in the office of county recorder through the resignation of the incumbent, the board of county commissioners shall fill the vacancy, and the appointment shall expire when a successor has been elected and qualified; and if a successor of the resigning officer has properly been elected before the resignation, the appointment shall expire when such resigning officer's term would have expired in regular course, and such elected successor has qualified for the term for which he was elected; and if at the time of such resignation no successor for the resigning officer has been

elected, the appointment shall expire when a successor elected at the next general election after such resignation shall have qualified. See *People, ex rel.*, v. *Potter*, 47 N. Y. 375.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the relator.

Filed Nov. 22, 1883.

---

No. 9918.

## BRAKE ET AL. *v.* BROWNLEE, ADMINISTRATRIX.

| | |
|---|---|
| 91 | 359 |
| 126 | 426 |
| 91 | 359 |
| 162 | 277 |

SHERIFF'S SALE OF REAL ESTATE.—*Written Memorandum.—Rights of Purchaser.*—Where, upon proper notice of the time and place of sale, the sheriff offers and sells, according to law, a tract of land to the highest and best bidder for a reasonable price, and at the time makes a written memorandum of such sale, the purchaser will be entitled, upon payment or tender of the amount of his bid, to the sheriff's certificate of such sale, and, at the proper time, if there be no redemption from the sale, to the sheriff's deed of such real estate.

SAME.—*Sale in Parcels.—Sale in Solido.*—On a sale of real estate by a sheriff, upon execution or order of sale, if such real estate consist of two or more lots, tracts, or parcels, it is the imperative duty of the sheriff to offer each of them separately; and if he receive a fair and reasonable bid for a single lot, tract, or parcel, when separately offered, it is also his duty to separately sell the same to such bidder, although the amount of the bid be not sufficient to satisfy the execution or order of sale. In such case, the fact that the sale of all the lots, tracts, or parcels, may be necessary to satisfy the execution or order of sale, will not authorize the sheriff to sell the same *in solido*.

From the Superior Court of Vigo County.

*N. G. Buff* and *D. T. Morgan*, for appellant.

*G. C. Duy, G. W. Faris, C. F. McNutt* and *J. G. McNutt*, for appellee.

HOWK, J.—This suit was commenced by John R. Brownlee, as plaintiff, against the appellants, John J. Brake, Carl Brake and Jackson Stepp, as sheriff of Vigo county, as the defendants, in a complaint of one paragraph. In his com-

plaint the plaintiff alleged that on May 13th, 1880, John J. Brake sued out of the clerk's office of the Vigo Circuit Court an execution upon a judgment therein rendered, on June 13th, 1876, in his favor and against John V. Carr, and Stephen Brady, which execution was delivered to the then sheriff of Vigo county, and commanded him to make thereon the sum of $1,278.80, the principal, interest and costs of such judgment, and accruing costs; that such judgment was then in full force against said Carr and Brady, and was wholly unpaid, and the full sum for which the execution issued was then due thereon; that, by virtue of such execution, the then sheriff, on May 25th, 1880, levied upon the two tracts of land in Vigo county, described in the complaint as the property of said John V. Carr; that on June 19th, 1880, after having first duly advertised such tracts of land for sale as required by law, the then sheriff offered the same at public auction, at the court-house door in the city of Terre Haute, between the hours of ten o'clock A. M. and four o'clock P. M. of said day, and the plaintiff then and there bid the sum of $500 for the first described tract of land, to wit, the east half of the northwest quarter of section 17, in town 10 north, of range 9 west, and, he being the highest and best bidder, the said tract was then and there by the sheriff struck off and sold to the plaintiff, and a written memorandum thereof was made by the sheriff, and the plaintiff offered to pay the amount of his bid, but was told by the sheriff that he had not time to attend to it that afternoon and to make out the certificate of purchase, but to come in on Monday morning and it would be ready for him, and the plaintiff, in accordanee with his directions, went to his office on the following Monday morning and offered to pay the amount of his bid and demanded his certificate of purchase, which being refused, he then and there tendered the sum of $500 in lawful money of the United States, and again demanded a certificate of purchase, which was again refused.

The plaintiff further alleged, upon information, that, after

his purchase of the tract of land described as aforesaid, the then sheriff, at the request and instigation of the defendant John J. Brake, disregarding the plaintiff's rights and ignoring the sale already made to him, and without notifying him, returned to the court-house, and illegally, and without right, re-offered the said real estate for sale, and struck off and sold both tracts of land to the defendant John J. Brake, who, as the plaintiff was informed and believed, was then claiming to have a right to a deed of such property, at the expiration of the year for redemption, on June 19th, 1881.

The plaintiff further alleged that he had been at all times since his purchase ready, willing and anxious to pay the amount of his bid, and he then brought into court the said sum of $500, for the use of the judgment plaintiff.

Wherefore the plaintiff prayed that the defendant Stepp, as sheriff, might be restrained by the order of the court from executing a deed to John J. Brake for the tract of land so purchased by plaintiff, and that, upon the final hearing, the sheriff might be directed to execute a deed of such tract of land to the plaintiff, and that his title thereto might be quieted, etc.

Afterwards, the plaintiff amended his complaint, by alleging that the sheriff's sale, charged in the original complaint to have been made to John J. Brake, was in fact made to Carl Brake as purchaser, but that Carl Brake made such purchase at the instigation, request and procurement of John J. Brake, who was the real party in interest in such sale; that, on June 19th, 1880, John J. Brake receipted over his own signature, on the execution, for the full amount of his judgment, to satisfy which the sale was made; that Carl Brake had no interest whatever in the land or sale, except to do the bidding of John J. Brake; and that Carl Brake never paid any money on such purchase, and never had any interest therein, but claimed an interest by reason of the purchase having been made in her name; wherefore, etc.

The death of the plaintiff, John R. Brownlee, was afterwards suggested to the court, and the appellee, Jane M.

Brownlee, as administratrix of his estate, was made plaintiff in his stead. The cause was put at issue and tried by the court, and a finding was made for the appellee, and judgment was rendered accordingly, as prayed for in the complaint.

The only error relied upon by the appellants' counsel in argument, for the reversal of the judgment, is the overruling of the defendants' motion for a new trial. The only causes assigned for such new trial, in the motion therefor, were, that the finding of the court was contrary to law, and was not sustained by sufficient evidence. There is no conflict in the evidence appearing in the record. The facts stated in the complaint were proved, by the oral and written evidence, substantially as alleged. It is claimed, however, by the appellants' counsel, that the sale of the tract of land to John R. Brownlee was shown to have been a mistake on the part of the sheriff's deputy who made the sale; and that, therefore, the sale was invalid and the finding of the court was erroneous. The material portion of the evidence of the deputy sheriff, who made the sale, reads as follows: "That at the time he made the sale to John R. Brownlee of the 80-acre tract for $500, he had in his pocket a written bid of $1,322.64 for the whole of the lands advertised, which fact he had forgotten when he struck off the 80-acre tract to Mr. Brownlee; that immediately after the sale he notified Mr. Duy, Mr. Brownlee's attorney, that he had made a mistake and should re-offer the land, which he did, as set out in the return."

The testimony of George C. Duy, Esq., Mr. Brownlee's attorney, on the subject of the alleged mistake, was as follows: "After the sale the sheriff informed me of the Brake bid for all the land, for the amount of the judgment, and I then told him (the sheriff) that I knew nothing about a bid from Brake, and that I would rely upon the sale of the eighty acres to Brownlee. I knew nothing of any bid by Brake till after my bid was made and purchase closed, and memorandum made by the sheriff of the sale to Brownlee on my bid."

We do not think that this evidence shows any such mistake in the premises as would or ought to invalidate the sheriff's sale to John R. Brownlee. Certainly, the sale was valid and binding as against Brownlee, and we know of no good reason why it should not be held equally as valid and binding in his favor. It was the legal duty of the sheriff to separately offer and sell the two tracts of land, if he could do so; and that he could offer and sell one of two tracts, separately from the other tract, is conclusively shown by the fact that he did separately offer and sell one of the tracts to Brownlee. It is not shown or claimed that the sheriff had, or held any competing bid, which he had forgotten, for the single tract of land which he offered and sold, according to law, to John R. Brownlee. In *Tyler* v. *Wilkerson*, 27 Ind. 450, this court held that a sale by a sheriff of several distinct parcels of land, *in solido*, without offering the several tracts separately, is voidable. This decision has been repeatedly approved, and, so far as we are advised, has never been doubted even in this court. *Piel* v. *Brayer*, 30 Ind. 332; *Gregory* v. *Purdue*, 32 Ind. 453; *Voss* v. *Johnson*, 41 Ind. 19. The correctness of these decisions is not questioned in *Weaver* v. *Guyer*, 59 Ind. 195, cited by appellants' counsel; but it was there held that the doctrine of the cases cited was not applicable to, nor decisive of, the case then in hand.

In the case at bar, we are of opinion that the evidence shows a valid sale of the 80-acre tract to John R. Brownlee, and an invalid and void sale of both tracts to the appellant Carl Brake.

The judgment is affirmed, with costs.

Filed Nov. 21, 1883.

No. 10,672.

## PATTERSON *v.* STATE, EX REL. DAY.

BASTARDY.—*Escape of Defendant.—Re-Arrest.*—Where a defendant in a bastardy case has been arrested and escapes, and the case certified to the circuit court, the defendant may thereafter be arrested though more than four years have elapsed since the institution of the proceedings before the justice.

SAME.—*Assignment of Error.—Judgment.—Justice of the Peace.—Jurisdiction.*—Where the relatrix in such case makes application to the circuit court for a warrant for the arrest of the defendant, and the defendant on appeal assigns as error that the court had no jurisdiction, because it appears upon the face of the application that proceedings were instituted more than two years after the birth of the child, such assignment can not be supported by insisting that the court had no jurisdiction, because the justice did not adjudge him to be the father of the child. An assignment of error based on one ground can not be supported by another.

PRACTICE.—*Evidence.—New Trial.*—Without a motion for a new trial, the action of the court in disregarding certain evidence is not presented.

From the Marion Circuit Court.

*R. B. Duncan, C. W. Smith, J. S. Duncan* and *J. R. Wilson*, for appellant.

*W. W. Woollen*, for appellee.

BEST, C.—This was a prosecution for bastardy. The appellant after his arrest escaped, and the justice, in his absence, proceeded with the trial, found the complaint to be true, and adjudged that the cause be certified to the circuit court. This was done, and thereafter the circuit court, without any notice to, or appearance by, the appellant, tried said cause. and rendered judgment against him. Nearly four years thereafter, upon the petition of the relatrix setting forth these facts, the court caused the arrest of the appellant, tried the cause anew, and again rendered judgment against him. From this judgment this appeal has been taken.

Many alleged errors have been assigned, but those only will be noticed which have been mentioned by appellant in his brief.

The first is that the court below had no jurisdiction in the cause for the reason that the appellee, on the face of her petition, shows that the proceedings were instituted more than two years after the birth of the child. The statute provides that no prosecution shall be instituted after two years from the birth of the child, but this provision applies to the institution of proceedings before the justice, and not to such proceedings as may be necessary to arrest a defendant who has escaped after the commencement of the suit. The fact, therefore, that the appellant was not arrested for more than two years after the birth of the child, furnishes no obstacle to the maintenance of the action.

The appellant also insists that the justice did not adjudge him the father of the child, and by reason thereof the court had no jurisdiction of the cause.

No assignment of error presents this question and we express no opinion upon it. The assignment already considered was limited to the ground therein stated, and, for that reason, can not embrace this one. An alleged error upon one ground can not be supported by another.

The appellant also insists that the court upon the trial erred in disregarding the first judgment. No motion for a new trial appears in the record, and hence no such question is properly presented.

No other questions are discussed, and as the assignments mentioned can not be maintained, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellant's costs.

No. 10,830.

91 366
166 94

## CREAMER *v.* SIRP.

BILL OF EXCEPTIONS.—*Motion to Strike Out.—When Alleged Error Considered.—Supreme Court.*—It is not necessary to file a motion in the Supreme Court to strike out a bill of exceptions; when such an objection is pointed out, or appears in the record, the court will consider it when deciding the case.

SAME.—*Presentment to Judge.—Filing.*—When time is given within which to file a bill of exceptions, and it appears from the bill of exceptions in the record, that it was presented to the judge within such time, this is sufficient under section 629, R. S. 1881, although the bill of exceptions was not filed within the time.

AGREEMENT.—*Action on Contract Made with Ancestor.—Evidence.—Testimony of Parties.—Statute Construed.*—A father and mother conveyed lands to a son; thereafter, in consideration of such conveyance, and the transfer of certain personal property, the son agreed, in writing, with the father, that after the death of the father and mother he would pay each of his sisters $100; after such death a sister sued on the contract.

*Held*, that such sister did not claim as *heir* or *devisee* within the meaning of section 499, R. S. 1881, which prohibits parties so claiming from testifying, and the plaintiff had a right to testify that she accepted such contract.

SAME.—*Modification of by Father and Son After Acceptance, and Without Sister's Consent.*—When, in such case, the sister has accepted such agreement, it becomes an executed contract so far as she is concerned; and her rights thereunder can not be altered by any new agreement between father and son; and it is not error to exclude evidence as to such new agreement.

From the Dearborn Circuit Court.

*H. D. McMullen* and *D. T. Downey*, for appellant.

*W. S. Holman* and *W. S. Holman, Jr.*, for appellee.

FRANKLIN, C.—Appellee sued appellant upon a written contract made by appellant with her father, in part for her benefit.

Issues were formed; there was a trial by jury, and a verdict returned in favor of the plaintiff for $100. Over a motion for a new trial judgment was rendered for the plaintiff.

The only error assigned is the overruling of the motion for a new trial.

Appellee has filed a motion to strike the bill of exceptions from the record, and insists in her brief that it is not properly a part of the record, for the reason that 30 days was given by the court within which to file the bill of exceptions, and that it was not filed within that time.

Such motions are unnecessary; whenever such objection is pointed out, or appears of record, the court will consider the question in deciding the case.

It is true that the record shows that the bill of exceptions was not filed within the 30 days allowed by the court, but the bill of exceptions shows that it was presented to the judge within the time allowed, and, under the 629th section of the code of 1881, this is sufficient.

The only reasons for a new trial presented by appellant in his brief are the improper admission and rejection of testimony. The court admitted the testimony of appellee as a witness, and rejected the testimony of appellant as a witness.

The facts in the case are these: Appellee and appellant are brother and sister; that on the 31st day of May, 1861, Frederick Creamer and wife, the father and mother of these parties, conveyed by deed to the defendant a certain tract of land containing 70 acres, situated in said county; that on the 17th day of January, 1865, in consideration of said deed, and the transfer of personal property with the possession of said premises, the defendant agreed in writing with the father, among other things, after the death of the father and mother, to pay to five sisters $100 each, in annual instalments; that appellee's $100 was payable in two years after the death of the old people; that the mother died March 3d, 1870, and the father died July 1st, 1878; that the plaintiff, at the time of said agreement, consented to, and accepted said arrangement as a satisfactory adjustment and disposition of her father's property, and then so informed appellant; that after the same became due she demanded the $100 of defendant, which he refused to pay, and this suit was commenced to recover the same on the 11th day of September, 1881.

The defendant, on the 1st day of May, 1882, answered by a denial, and by a special paragraph setting up that subsequent to the execution of the agreement sued on, to wit, on the — day of April, 1865, he and the father agreed to cancel the former agreement and make a new one, and they did execute a new one, by which he was only to pay the plaintiff $1 instead of $100. The new agreement set up by the defendant is the same as the old agreement sued on by plaintiff, with the above named exception.

There is no date given to the copy of the new agreement in the record.

The parties gave their respective agreements in evidence, and when the appellee was introduced as a witness on her own behalf, to prove her consent to and acceptance of the provisions of the first agreement, and her notice to appellant of such fact, appellant objected, for the reason that appellee was an heir, and this was a suit between heirs in relation to a contract made with the ancestor, and that appellee was an incompetent witness as to anything about the contract occurring in the lifetime of the ancestor. The objection was overruled, and appellee gave her testimony upon said points.

This objection is made under the 499th section of R. S. of 1881, which reads as follows: "In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor."

While this is a claim growing out of a contract with the ancestor, it is not claimed as heir or devisee, but by grant in the contract, and it does not in any manner affect the ancestor's estate, or any property, real or personal, formerly owned by him.

The property had all passed into the hands of the defendant in the lifetime of the ancestor, and no claim whatever is

set up in relation to any part of said property. It is an individual obligation of the defendant for part payment for the property, that is sued upon. And after the plaintiff accepted the provisions made for her benefit, and notified defendant thereof, she became a party to it, and it was then a contract between plaintiff and defendant, without reference to heirship or devise; and we do not think that section 499, *supra*, applies to this case.

There was no error in admitting such testimony.

The defendant in his evidence offered himself as a witness, and proposed to testify to a conversation with the father in the absence of the appellee, at the time of the execution of the second agreement, in relation to the reasons why the change was made. The testimony in relation to this conversation was objected to, and the objection sustained by the court. This testimony is insisted upon as a part of the *res gestæ* in the execution of the new agreement.

The old agreement had been fully executed; appellee had accepted its provisions, in so far as she was concerned, and notified appellant of that fact, before it is claimed that the new agreement was executed. She had acquired a personal interest in the old contract, which could not be affected by anything the father might afterwards say in her absence, and what he may have said in the conversation proposed to be testified to could not bind appellee. Wherefore there was no available error in excluding the testimony.

We find no error in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Nov. 22, 1883.

91 370
e171 639

No. 11,009.

## HOOVER *v.* AGNEW, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Growing Crops.—Widows' Rights.—Complaint.*—Adjacent to the dwelling of an intestate was, when he died, a field of twenty acres of growing wheat—part of his farm. His widow, a second wife, made no selection of forty acres, as her quarantine, under the statute, R. S. 1881, section 2492, which did not include the wheat field. The administrator, as such, took the wheat, too, and she sued him as administrator to recover its value.

*Held*, that her complaint averring these facts was good on demurrer.

SAME.—*Statute Construed.*—The widow's right of quarantine, under the statute, belongs to any widow, and does not depend upon the existence of minor children.

From the Pulaski Circuit Court.

*G. Burson*, for appellant.

*N. L. Agnew*, for appellee.

ZOLLARS, J.—This action is by appellant, the widow of Jacob Hoover, deceased, against appellee, as the administrator of her deceased husband's insolvent estate. It is averred in the complaint, amongst other things, that the husband died in 1882, the owner of a farm with a dwelling-house thereon, in which he and appellant, his second wife, were living at the time of his death, and in which she lived for about a year thereafter, and until the real estate was sold to pay debts; that at the time of the husband's death there was twenty acres of growing wheat in a field immediately adjacent to the dwelling, one-third of which wheat belonged to a tenant, and the two-thirds to appellant, as widow; that she made no selection or election to take and hold, for the year succeeding her husband's death, any other forty acres of the real estate in place of the fields adjoining the dwelling and upon which the wheat was growing, nor did she receive or claim any of the rents, for the year, of any other part of the real estate; and that the appellee, as administrator, has taken her portion of the wheat, converted it into money, and mixed it

with the other moneys of the estate. Prayer that she may, by proper judgment, recover the value of the wheat.

Appellant prosecutes this appeal, assigning as error the sustaining of a demurrer to the complaint. Her claim for a recovery is based upon section 2492, R. S. 1881, which is as follows: "A surviving wife and minor children shall, in all cases, be allowed to remain in the ordinary dwelling-house of the family, and to occupy the same and the messuage thereunto appertaining, and fields adjacent, if any, not exceeding forty acres, free of rent, for one year from the death of her husband."

We have no brief from appellee, and do not know upon what ground he challenged the complaint, or upon what ground the trial court sustained the demurrer, except as we gather from the briefs of appellant's counsel. From the statements therein, the complaint seems to have been held insufficient partially upon the authority of the case of *Tucker* v. *Murphy*, 71 Ind. 576, and partially because the complaint shows that there are no minor children, and that appellant was a second wife. In the case of *Tucker* v. *Murphy*, *supra*, the contest was between the widow and the administrator of her husband's estate, in relation to wheat which was growing upon the land at the time of the husband's death. No question is made by the learned judge who delivered the opinion of the court as to the right of the widow to the wheat under the statute, had her claim been asserted by a sufficient plea. The judgment was affirmed against the widow because it did not appear from her plea but what she may have had the use and rent of the full 40 acres allowed by the statute, without the field upon which the wheat was grown. That can not be said of the case in hearing. The statute does not provide for any time or manner of selection, nor does it require that any selection of the 40 acres shall be made by the widow. Manifestly, a sufficient selection would be indicated by occupying and using the land, or by claiming the annual crops when interfered with or taken by others.

The statute provides that the surviving wife and children shall occupy and use the dwelling and 40 acres of land, but it by no means follows from this that if there be no minor children, or if they refuse to remain with her, the widow shall be turned out and deprived of the protection provided by the statute. *Weaver* v. *Low*, 29 Ind. 57.

No distinction is made between a first or second wife. The language of the law is, that in all cases the surviving wife, etc. No plausible reason can be given why there should be any such distinction.

It is settled by the adjudications of this court that the right to occupy and use the 40 acres includes the right to the crops maturing thereon; otherwise, the surviving wife might receive but little benefit, and the purpose of the statute be thwarted. *Swain* v. *Bartlow*, 62 Ind. 546; *Jones* v. *Jones*, 81 Ind. 292. Ordinarily, the administrator is entitled to the crops growing at the death of the husband and owner of the land; but this right is subordinate to the rights of the surviving wife and minor children, in a case like this, whether the husband's estate be solvent or insolvent. The intent of the legislation is to make provision for the wants of the widow and children, treating their immediate necessities as paramount to the claims of creditors. This bounty is assured, in the language of the statute, "in all cases." It is in accord with the spirit of the legislation of this and other States, making provision for the surviving wife and children.

It is greatly to the credit of the law that for centuries it has secured some such protection to the widow and children. As far back as the reign of Henry II. the husband could not will away from the widow and children more than one-third of his personal property. "The Magna Charta of Henry III., which established and defined the rule of dower, made a special provision that the widow might tarry 40 days after her husband's death in her husband's house. This latter privilege has since been known as the widow's *quarantine*," and has been

recognized and extended by statute in many of the States. Schouler Ex'rs & Adm'rs, secs. 448, 449, 457.

Without further comment, we think the complaint sufficient, and that the court below erred in sustaining the demurrer.

The judgment is reversed, with costs, and the court below directed to overrule the demurrer, and proceed in accordance with this opinion.

Filed Oct. 16, 1883. Petition for a rehearing overruled Nov. 20, 1883.

---

No. 10,418.

## PIPER ET AL. *v.* FORCE.

MORTGAGE.—*Foreclosure.—Grantee of Mortgagor.—Answer.—Evidence.—Burden of Issue.*—Where suit is brought to foreclose a mortgage against the mortgagor and his grantees, and the grantees alone appear and allege, in their answer, that they are innocent purchasers, in good faith and for full value, of the mortgaged premises, and have fully paid the purchase-money, and that, in making such purchase, they relied upon the validity of a certain judgment quieting the mortgagor's title against the plaintiff in this suit, to which answer a reply in denial was filed.

*Held*, that the burden of the issue was on the defendants, and, as they introduced no evidence tending, even remotely, to prove any one of the facts stated in their answer, their motion for a new trial was correctly overruled.

From the Pulaski Circuit Court.

*N. L. Agnew*, for appellants.

*W. Spangler*, for appellee.

HOWK, J.—This was a suit by the appellee, Force, against the appellants Andrew J. Piper, Jesse Piper and Ferdinand Kupfer, to foreclose a certain mortgage on real estate, and to collect the debt thereby secured. The mortgage and notes in suit were executed by the appellant Kupfer to one Richard Miskimmius, and were by him assigned by endorsement in writing to the appellee. It was alleged in the complaint that

the mortgage was duly recorded in the recorder's office of Pulaski county, and that the appellants Piper and Piper, who claimed to be the owners of the mortgaged premises, purchased the same after the record of the mortgage and with notice thereof. The issues in the cause were tried by the court, and a finding was made for the appellee, and, over a motion for a new trial, the court rendered judgment accordingly.

The only error assigned by the appellants, in this court, is the overruling of their motion for a new trial. The only question discussed by appellants' counsel, in his brief of this cause, is the alleged insufficiency of the evidence to sustain the verdict. In the second paragraph of their answer, the appellants Piper and Piper alleged that before the commencement of this suit, John Kupfer instituted an action against the appellee, Force, alleging in his complaint therein that he, Kupfer, was the owner in fee simple of the real estate covered by the mortgage now in suit, and that Force claimed an interest in or title to such real estate adverse to Kupfer's title, but that such claim was unfounded, and praying that his, Kupfer's, title to and interest in such real estate might be quieted and forever set at rest as against the appellee, Force; that such proceedings were had in said action that, at the January term, 1879, of the court, a judgment was therein rendered by the court that Kupfer's title in and to such real estate should be quieted and set at rest, as against the appellee, Force, and that he, Force, should be enjoined from asserting any claim or title in or to such real estate as against said Kupfer; that the lien of the mortgage now in suit was, or might have been, adjudicated and determined in said action, Force's interest in such real estate, if any, having arisen prior to the commencement of the action, and that the action was brought to determine the lien of Force's mortgage and to quiet the title against it; that the appellants Piper and Piper were the owners of the mortgaged premises, under a warranty deed from the mortgagor Kupfer and his wife, dated August 26th, 1879, subsequent to the rendition of said judg-

ment quieting Kupfer's title against the appellee Force, and that they fully paid the full value of said premises to said Kupfer, and that they bought the premises in good faith, believing that Kupfer had a valid title thereto, free from all liens and encumbrances, and relying on the validity of the judgment quieting his title; that after they, Piper and Piper, purchased such real estate and became the owners thereof, the appellee, Force, filed his complaint to review such judgment, and at the January term, 1882, of the court, a judgment was thereon rendered for the review of the former judgment; that Kupfer was the sole defendant to such complaint for review, and had appealed from the judgment thereon rendered to the Supreme Court and, within the proper time, had filed his bond for the stay of further proceedings on such judgment, under the order of the court, to the approval and satisfaction of the clerk, and had, within the time provided by law, filed a transcript of such judgment in the Supreme Court, where the said cause was then pending, and that, in that action, the lien of the appellee's mortgage might be determined; wherefore the appellants asked that no further action should be taken in this cause until the determination of such appeal by the Supreme Court. The appellee replied to this paragraph of answer by a general denial.

In discussing the sufficiency of the evidence the appellants' counsel says: "Does the evidence prove that there is another action pending for the same cause between the same parties? Does the proof sustain the defendants' answer? And, if so, does it entitle the defendants to the relief prayed for? We certainly think these questions should be answered in the affirmative, and we invite the consideration of the court to the answer, and to the defendant's evidence set out in the bill of exceptions."

We have given proper consideration to the appellants' answer, and to all the evidence appearing in the record, and our conclusion is that each of the questions propounded by counsel ought to be and must be answered in the negative. The

action now pending and the action mentioned in the answer are not for the same cause, and certainly are not between the same parties. This is shown by the averments of the answer. The fundamental facts alleged in the answer are, that the appellants Piper and Piper are innocent purchasers, in good faith and for full value, of the mortgaged premises; that they have fully paid the purchase-money, and that, in making such purchase, they relied upon the validity of the judgment quieting the title to such premises. There is no evidence in the record tending, even, to prove any one of these facts. On the contrary, there is evidence in the transcript from which the trier of the facts might have found that Piper and Piper, in their purchase of the mortgaged premises, were mere volunteers. We may add, in this connection, that in the case appealed to this court, mentioned in the appellants' answer, the judgment below was affirmed, and the opinion of this court is reported under the title of *Keepfer* v. *Force*, 86 Ind. 81.

We are of the opinion that, while the evidence fully sustains the appellee's cause of action, there is an absolute failure of evidence in support of the appellants' defence. Therefore, the court did not err in overruling the motion for a new trial.

The judgment is affirmed, with costs.

Filed Nov. 22, 1883.

---

91 376
139 499
91 376
144 655

No. 11,230.

## THE STATE *v.* HALLOWELL.

CRIMINAL LAW.—*Appeal.*—*Question Reserved.*—*Record.*—*Verdict.*—*Judgment.*—In case of an appeal, upon the part of the State, from a question reserved, in a criminal case, no question is presented to the Supreme Court where the record does not contain the verdict and judgment of acquittal.

SAME.—*Statute Construed.*—*Certiorari.*—Under section 1883, R. S. 1881, it is not the duty of the Supreme Court, in such case, on its own motion, to direct the clerk to certify up a correct record. The writ of certiorari can issue only upon motion sustained by affidavit, showing a diminution of the record.

The State *v.* Hallowell.

From the Clinton Circuit Court.

*W. R. Hines*, Prosecuting Attorney, *L. McClurg* and *W. R. Moore*, for the State.

*R. P. Davidson*, *F. M. Goldsberry*, *A. E. Paige* and *S. O. Bayless*, for appellee.

HAMMOND, J.—This is an appeal by the State in a criminal case, upon questions reserved, upon the refusal of the court below to give to the jury certain instructions which were tendered by the prosecuting attorney. If there was any record made of the trial, the verdict of the jury, or the judgment of the court, it is not embraced in the transcript. Sec. 1883, R. S. 1881, relating to appeals in such cases, is as follows: "In case of an appeal from a question reserved on the part of the State, it shall not be necessary for the clerk of the court below to certify, in the transcript, any part of the proceedings and record except the bill of exceptions and the judgment of acquittal. When the question reserved is defectively stated, the Supreme Court may direct any part of the proceedings and record to be certified to them."

As the record does not contain the verdict and judgment of acquittal, the appeal presents no question for the consideration of this court. It might be inferred from the last part of the section above quoted, that this court should, of its own motion, direct the clerk of the court below to certify to us the record of the verdict and judgment. The writ of *certiorari* can issue only upon motion, supported by affidavit, showing a diminution of the record. We do not judicially know but that the clerk has certified all the record that was made in the case.

The appeal is not sustained.

Filed Nov 22, 1883.

No. 10,025.

## JONES, ADMINISTRATOR, *v.* JONES.

91 378
135 581
91 378
134 349
91 378
141 500
91 378
147 583
91 378
165 418
165 419
97 378
167 11

STATUTE OF LIMITATIONS.—*Guardian and Ward.*—When a ward reaches full age, money in the hands of his guardian is due without demand, and the statute of limitations, which is six years, then begins to run.

DECEDENTS' ESTATES.—*Appeal to Supreme Court.*—By the statutes in force March 11th, 1881, an administrator might appeal to the Supreme Court from the allowance of a claim without bond, and file the transcript within one year.

From the Montgomery Circuit Court.

*H. H. Ristine, T. H. Ristine* and *B. T. Ristine*, for appellant.

*E. C. Snyder*, for appellee.

BICKNELL, C. C.—This was a claim by an administrator against the estate of his decedent. The claimant, in his individual capacity, made himself, as administrator, the adversary party. *Hubbard* v. *Hubbard*, 16 Ind. 25; Acts of 1875, p. 59. The claim was duly verified; there was an answer in nine paragraphs, of which the first was the general denial; replies were filed in denial of the others. The issues were tried by the court who, at the defendant's request, made a special finding of the facts, and stated conclusions of law thereon as follows:

1. On the 20th of December, 1849, Abner Jones was duly appointed and qualified guardian of Isaac W. Jones, the claimant herein.

2. On the 14th of February, 1859, the plaintiff attained the age of twenty-one years.

3. This suit was commenced on the — day of ——, 1880.

4. At the time of the appointment of Abner Jones as guardian, he received $37.50, the estate of claimant.

5. He never made any settlement of said trust.

6. When claimant became of age he was living with his said guardian, who was his father, and continued to live with or near him until his father died, in May, 1879.

7. Said guardian never accounted with claimant for said money.

The conclusion of law upon the above facts is that the plaintiff is entitled to recover of the defendant the said sum of $37.50 with interest at 4 per cent. from July 14th, 1859. The defendant excepted to the conclusions of law; judgment was rendered in favor of the claimant for $107.25 and costs, to be levied of the assets of the estate. The defendant appealed. He assigns as error that the court erred in its conclusions of law.

The question presented is, was the claim barred by the statute of limitations of six years, or of fifteen years, or of twenty years?

This was a stale demand. In the absence of evidence to the contrary, the presumption would be it had been paid. Even in cases of chancery jurisdiction, to which the statute of limitations is not a bar, a court of equity will presume that a stale demand has been paid. *Parker* v. *Ash*, 1 Vern. 256; *Sturt* v. *Mellish*, 2 Atk. 610; *Higgins* v. *Crawfurd*, 2 Vesey Jr. 571; *Smith* v. *Calloway*, 7 Blackf. 86; *Stehman* v. *Crull*, 26 Ind. 436. Generally, in regard to lapse of time, courts of equity respect the statute of limitations. *Murphy* v. *Blair*, 12 Ind. 184.

There can, however, be no presumption of payment in the case at bar, because the court has found that the claim was never paid. Technical and continuing trusts, such as formerly fell within the peculiar and exclusive jurisdiction of courts of equity, were not affected by the statute of limitations. *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *Murray* v. *Coster*, 20 Johns. 576. Administration is one of the trusts of which courts of equity had exclusive cognizance. *Smith* v. *Calloway*, *supra*.

Guardianship is a trust of like kind, and is governed by the same general rules. 2 R. S. 1876, pp. 585, 598. Therefore, as long as such a trust is continuing, the statute of limitations will not bar an action to enforce it. The appellant claims that in the present case the trust was not continuing,

but ended in 1859, when the claimant came of age, and was no longer a continuing trust in the meaning of the cases above cited. It was held, in *Kidwell* v. *State, ex rel.*, 45 Ind. 27, that the marriage of a female infant ward puts an end to the guardianship. And see 2 R. S. 1876, p. 591, section 12; *Ex Parte Post*, 47 Ind. 142. In general, guardianship terminates when the ward attains the age of twenty-one years. 2 R. S. 1876, p. 589, section 6; *Stroup* v. *State, ex rel.*, 70 Ind. 495.

At the expiration of the trust, it becomes the duty of the guardian "fully to account for, and pay over to the proper person, all the estate of said ward remaining in his hands." 2 R. S. 1876, p. 590, section 9, clause 4. In the present case, the ward being of age, he was the proper person to whom the money should have been paid (*Stroup* v. *State, ex rel., supra*), and his remedy was either an action against the guardian personally, or an action on his bond. *Stumph* v. *Pfeiffer*, 58 Ind. 472. In *Spicer* v. *Hockman*, 72 Ind. 120, it was held that on the marriage of a female ward, and the consequent maturity of her claim for a settlement with her guardian, the guardianship ceases, and the guardian becomes simply her debtor for the balance of her means in his hands not accounted for. And see *Voris* v. *State, ex rel. Davis*, 47 Ind. 345.

It has been held that where money is payable at a fixed date, or on the happening of a certain event, no demand is necessary before suit brought, and that an action may be maintained against a guardian without previous demand. *Shook* v. *State, ex rel.*, 53 Ind. 403; *Hudson* v. *State, ex rel.*, 54 Ind. 378; *Voris* v. *State, ex rel., supra*. Where, however, a demand is essential to the maintenance of a suit for the non-performance of a promise or duty, the statute of limitations does not begin to run until a demand has been made. *Raymond* v. *Simonson*, 4 Blackf. 77.

In the present case no demand was necessary. After the ward became of age, he had a remedy at law by an action against his guardian personally, or by an action on the bond. It was always held that although the case be such that the

statute of limitations could not be pleaded if there were no remedy except in equity, yet if there be both a legal and an equitable remedy, and the former be barred by the statute, the latter will also be so barred. *Raymond* v. *Simonson, supra; Smith* v. *Calloway, supra.*

Here, the claimant, having a personal remedy at law against his guardian in 1859 for money had and received, waited 20 years, until his guardian was dead, and then waited another year before he brought his suit, and then brought suit against himself as administrator. Under the authorities hereinbefore cited, the statute of limitations of six years was a good bar; it was not necessary to the claimant's right of action that there should be a settlement of the guardian with the proper court, and a formal discharge of the guardian by that court, nor was it necessary to such right of action that the guardian should disavow his trust. *Heady* v. *State, ex rel.*, 60 Ind. 316; *Bescher* v. *State, ex rel.*, 63 Ind. 302. The court below erred in its conclusions of law.

The cause was decided on March 11th, 1881; the transcript was filed in this court on March 11th, 1882; the cause was submitted by agreement July 13th, 1882; nearly six months afterwards the appellee moved to dismiss the appeal, because: 1. This court had no jurisdiction of the appeal; 2. The transcript was not filed in 20 days after the rendition of the judgment; 3. No appeal bond was filed; 4. There is no law authorizing the appeal.

This being an appeal by an administrator, he was not required to file a bond. 2 R. S. 1876, p. 557, section 193.

Under the law in force then, even when a bond was necessary, the transcript was not required to be filed here in 20 days after judgment rendered. 2 R. S. 1876, p. 557, sections 189, 190. The court had jurisdiction of the appeal. 2 R. S. 1876, p. 557, sections 193, 189, 190; 2 R. S. 1876, p. 517; *Wright* v. *Wright*, 72 Ind. 149.

The motion to dismiss the appeal is overruled. The judgment ought to be reversed.

The City of Indianapolis *v.* Murphy.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below to state conclusions of law in favor of the appellant.

Filed Nov. 22, 1883.

No. 10,781.

## THE CITY OF INDIANAPOLIS *v.* MURPHY.

91 382
130 478
91 382
133 814
91 382
135 673

SUPREME COURT.—*Verdict.*—*Weight of Evidence.*—Where the evidence tends to establish the material averments of a good complaint, the Supreme Court will not disturb the verdict on the weight of the evidence.

CITY.—*Defect in Public Alley.*—*Constructive Notice.*—A city is chargeable with constructive notice of the existence of a dangerous defect in a public alley.

SAME.—*Damages.*—*Evidence.*—*Verdict.*—In an action for damages for an injury resulting from dangerous defects in a public alley, one witness testified that the defect had existed for six weeks prior to the injury; other witnesses, in some measure, corroborated this testimony. The verdict of the jury indicated that the jury believed and acted upon this testimony.

*Held;* that from the length of time the defect had existed, and the other facts and circumstances of the case, the jury was warranted in inferring knowledge on the part of the city of the existence of such defect.

PRACTICE.—*Instructions.*—*Presumption.*—Where the error assigned is the refusal of the court to give certain instructions asked by appellant, and the record does not contain general instructions, the presumption on appeal is that the court did its duty under the code (section 533, R. S. 1881), and gave general instructions covering the issues in the case.

SAME.—*Failure to Object to Refusal to Give Instructions.*—Where no objection or exception is taken to the refusal to give instructions asked, no question is presented on such refusal in the Supreme Court.

From the Marion Circuit Court.

*J. A. Pritchard*, for appellant.

*D. V. Burns* and *C. S. Denny*, for appellee.

ZOLLARS, J.—Action by appellee to recover for personal

injuries through defects in a public alley. From the judgment in her favor, appellant prosecutes this appeal.

On a former appeal, the complaint was held sufficient. *Murphy* v. *City of Indianapolis*, 83 Ind. 76.

The only questions argued on this appeal are as to the sufficiency of the evidence, and the giving and refusing of instructions. We do not regard the case as a strong one in favor of appellee, but as the complaint has been held sufficient, and as the evidence tends to establish all of its material averments, we can not disturb the verdict and judgment upon the weight of the evidence. There is a conflict in the testimony, but it was for the jury and trial court to say to whom credence should be given; we can not. This has been so often ruled that we forbear a citation of cases.

It is insisted that the city had no notice of the dangerous condition of the alley. So far as shown by the evidence, it did not have actual notice, but, clearly, it was chargeable with constructive notice. One witness, at least, testified that the defect in the alley had existed for the period of six weeks preceding the injury. He was, in some measure, corroborated by others. The verdict indicates that the jury believed and acted upon the testimony of this witness. From the length of time the defect had existed, and the other facts and circumstances of the case, the jury were warranted in inferring knowledge on the part of the city. *City of Lafayette* v. *Larson*, 73 Ind. 367, and cases cited; *City of Logansport* v. *Justice*, 74 Ind. 378 (39 Am. R. 79), and cases cited; *City of Evansville* v. *Wilter*, 86 Ind. 414, and cases cited; *City of Washington* v. *Small*, 86 Ind. 462; *City of Indianapolis* v. *Scott*, 72 Ind. 196.

Complaint is made that the court erred in refusing to give to the jury certain instructions asked by appellant. The record being silent upon the subject, we must presume that the court did its duty under the code, section 533, R. S. 1881, and gave to the jury general instructions, covering the issues in the case. These general instructions are not in the record, and, in their absence, we can not say that the court erred in

refusing those asked by appellant. The court may have refused them because it was about to give the substance of them in its own instructions. We can not say from the record, that the substance of them was not given by the court. The presumption is that the court committed no error in refusing those asked, and the record contains nothing to overthrow this presumption. Such being the case, it is not necessary for us to set out the instructions so asked, or to express an opinion as to whether or not they state the law correctly. *Bowen* v. *Pollard*, 71 Ind. 177; *Coryell* v. *Stone*, 62 Ind. 307; *Indiana, etc., Co.* v. *Millican*, 87 Ind. 87.

It is further contended that the trial court erred in giving the third instruction asked by appellee. So far as shown by the record, appellant neither objected nor excepted to the giving of this instruction, and hence it is not in a position to make any question upon it in this court. We may say, however, without setting out the instruction, that we have examined it, and think that it states the law correctly.

Finding no error in the record, the judgment is affirmed, with costs.

Filed Nov. 9, 1883.

---

No. 9649.

## HAAS ET AL. *v.* SHAW ET UX.

MARRIED WOMAN.—*Common Law.—Act of March 25th, 1879.—Rule of Construction.—Contract of Partnership.*—Under the common law, a married woman is incapable of binding herself by an executory contract, and all such contracts, whether in writing or by parol, are absolutely void at law. This was the law of this State until the act of March 25th, 1879, concerning married women, took effect and became the law; and while the provisions of this act were to be liberally construed, yet, as they were in derogation of the common law, they were not to be enlarged by construction beyond the plain meaning of the language used in the act. There is no sentence, clause, or section, in the act of March 25th, 1879, which authorized a married woman to bind herself by a contract of copartnership with her husband or any other person, or to carry on any

| | |
|---|---|
| 91 | 384 |
| 145 | 293 |
| 146 | 594 |
| 91 | 384 |
| 151 | 243 |

trade or business, or to perform any labor or service on the joint co-partnership account of herself and her husband, or any other person.

PLEADING.—*Reply.*—*Departure.*—*Demurrer.*—Where the reply is a departure in pleading, it is bad on demurrer for the want of sufficient facts.

EXEMPTION FROM EXECUTION.—*When Claimed.*—*Property Attached.*—*Answer.*—Property exempt from execution is not subject to seizure under an order of attachment; but where such property has been attached, and the defendant has the right to claim the same as exempt, he must do so by his answer before final judgment in the attachment proceeding, or his claim will come too late.

SAME.—*Reply.*—*Demurrer.*—Where, in such case, the defendant answers, showing his right to claim, and claiming, the attached property as exempt from execution and seizure under the attachment, a reply to such answer to the effect that the defendant has other property, describing it, besides the property attached, is bad on demurrer for the want of sufficient facts.

From the Shelby Circuit Court.

*O. J. Glessner*, *T. B. Adams*, *L. J. Hackney*, — *Campbell*, — *Bates* and — *VanMartels*, for appellants.

*A. Major*, *S. Major*, *H. S. Downey*, *C. Major*, and *T. S. Rollins*, for appellees.

HOWK, J.—In this case the appellants, the plaintiffs below, on the 20th day of October, 1880, filed their complaint against the appellees, in substance, as follows:

"The plaintiffs Benjamin Haas, Barnhard Weis and Adolph Haas, partners, trading under the name and style of Haas & Weis, complain of Daniel J. Shaw and Eliza L. Shaw, as partners, trading under the name and style of Shaw & Co., and say that the defendants, as such partners, are indebted to the plaintiffs in the sum of $828.41, for personal property sold and delivered by the plaintiffs to the defendants, as such partners, at their instance and request, the particulars of which are set forth in an account filed herewith, leaving due and unpaid said sum of $828.41, with interest due thereon from the 4th day of October, 1880. Wherefore," etc.

It may be fairly inferred, we think, from the itemized account filed with the complaint, that the goods were sold and

delivered, as alleged, during the year 1880, although the dates are not stated with much accuracy.

With their complaint the appellants also filed an affidavit wherein they stated, among other things, that the "defendants, and each of them, have sold, conveyed and otherwise disposed of their property, subject to execution, with the fraudulent intent to cheat, hinder and delay their creditors; and that the defendants, and each of them, are about to sell, convey and otherwise dispose of their property, subject to execution, with the fraudulent intent to cheat, hinder and delay their creditors."

The appellees severed in their defence. The appellee Eliza L. Shaw answered the complaint in a special paragraph, to which the appellants' demurrer, for the alleged insufficiency of the facts therein to constitute a cause of defence, was overruled by the court. They then replied specially, and to this reply the demurrer of Eliza L. Shaw, for the want of sufficient facts, was sustained by the court. The appellee Daniel J. Shaw answered the attachment proceedings in a special paragraph, to which the appellants' demurrer, for the alleged insufficiency of the facts therein, was overruled by the court. They then replied specially, and to this reply the demurrer of Daniel J. Shaw, for the want of facts, was sustained by the court. The appellants duly excepted to each of these rulings, and declined to reply further to either of the separate answers of the appellees. Thereupon the court rendered judgment that appellants take nothing by their suit against Eliza L. Shaw, that she recover of them her costs, and that as to her their attachment be discharged; that the appellants recover of Daniel J. Shaw the debt in suit and costs; and that the personal property, described in Daniel J. Shaw's answer, was exempt from sale, under the attachment proceedings.

The first error complained of by the appellants in this court is the overruling of their demurrer to the separate answer of Eliza L. Shaw to their complaint. In her answer she alleged, in substance, that before and at the time of the supposed sale

and delivery of the personal property mentioned in appellants' complaint, she was, hitherto had been, and then was a married woman and the wife of her co-appellee Daniel J. Shaw during all that time.

It is manifest, from our statement of this case, that the question of the sufficiency or insufficiency of this answer depends, for its proper decision, upon the construction which must be given to the provisions of an act entitled "An act concerning married women," approved March 25th, 1879. This act took effect and became a law on the 31st day of May, 1879, and continued in force during all the time covered by the account in suit, and until the 19th day of September, 1881. Prior to the taking effect of the above entitled act of March 25th, 1879, married women in this State were protected by the disabilities imposed on them by the common law, and were incapable of binding themselves by an executory contract. Thus, in *O'Daily* v. *Morris*, 31 Ind. 111, this court said: "It is a rule of the common law, too familiar and well settled to need the citation of authorities, that a *femme covert* is incapable of binding herself by an executory contract, and that all such contracts made by a married woman, whether in writing or by parol, are absolutely void at law. There is nothing in the legislation of this State in relation to married women, changing this rule of the common law, at least so far as it applies to such contracts at large." So the law remained, and so it was continuously construed by this court, until the taking effect of the aforesaid act of March 25th, 1879. *Thomas* v. *Passage*, 54 Ind. 106; *American Ins. Co.* v. *Avery*, 60 Ind. 566; *Liberty Tp. Draining Ass'n* v. *Watkins*, 72 Ind. 459; *Pierce* v. *Osman*, 79 Ind. 259; *Eberwine* v. *State, ex rel.*, 79 Ind. 266; *Parks* v. *Barrowman*, 83 Ind. 561.

The first statutory innovation upon this common law rule is the above entitled act of March 25th, 1879; and while the provisions of the act must be liberally construed, according to their true intent and meaning, yet, as they are in derogation of the common law rule, they are not to be enlarged by

construction beyond the plain meaning of the language used by the law-making power in their enactment. Pott. Dwarris, 257; *Schwarm* v. *Osborn*, 59 Ind. 245; *Logan* v. *Logan*, 77 Ind. 558. After the act took effect and became a law, a married woman in this State was emancipated from the disabilities imposed on her for her own protection by the common law, to the precise extent, and no further, contemplated and expressed by the General Assembly in the language of the statute. In other words, the common law rule still prevailed, after the taking effect of the act, except as such rule was abrogated or modified by the plain intent of the statute.

With this prefatory statement, we will now set out so much of the above entitled act of March 25th, 1879, as seems to us to have any bearing upon the proper decision of the question presented by the alleged error of the trial court in overruling the appellants' demurrer to the separate answer of Eliza L. Shaw. Omitting the enacting clause, section 1 provided that "A married woman may bargain, sell, assign and transfer her separate personal property the same as if she were sole."

"Sec. 2. A married woman may carry on any trade or business, and perform any labor or service on her sole and separate account. The earnings and profits of any married woman, accruing from her trade, business, services or labor, other than labor for her husband or family, shall be her sole and separate property."

"Sec. 3. A married woman may enter into any contract in reference to her separate personal estate, trade, business, labor or service, and the management and improvement of her separate real property, the same as if she were sole, and her separate estate, real and personal, shall be liable therefor on execution or other judicial process."

"Sec. 8. A husband shall not be liable for any debts contracted by the wife in carrying on any trade, labor or business on her sole and separate account, nor for improvements made by her authority on her separate real property."

"Sec. 10. A married woman shall not mortgage or in any

manner encumber her separate property acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person." Acts of 1879, pp. 160 and 161.

The sections quoted contain, we think, all the provisions of the aforesaid act of March 25th, 1879, which are applicable to the question we are required to decide. We are of opinion that these statutory provisions did not wholly abrogate or supersede the common law rule in force in this State at the time of their enactment, under which, as we have seen, a married woman was incapable of binding herself by any executory contract, and all such contracts, howsoever made, were absolutely void. Under the statute, and by force of its provisions, above quoted, a married woman was authorized to carry on any trade or business, and to perform any labor or service "on her *sole* and *separate* account," and not otherwise; and her earnings and profits from such trade, business, services and labor, other than labor for her husband or family, were to "be her *sole* and *separate* property." Of course, such married woman was rendered capable of binding herself by her executory contracts, in connection with her trade, business, labor, or service, "on her sole and separate account," but not on any other account. Except as to her contracts in relation to her trade, business, labor, or service, on her sole and separate account, the statute left such married woman precisely as she had been prior to its enactment, incapable of binding herself by an executory contract, and all such contracts, with such exception, were, as before, absolutely void. Certainly, there is no sentence, clause, or section, from the enacting clause to the final word or syllable of the above entitled act of March 25th, 1879, which can be said by any fair construction to authorize a married woman to bind herself by a contract of copartnership with her husband or any other person, or to carry on any trade or business, or to perform any labor or service on the joint or copartnership account of herself and her husband or any other person. We conclude, therefore, that the facts stated in the separate an-

swer of the appellee Eliza L. Shaw were sufficient to constitute a cause of defence in her behalf to appellants' cause of action, and that the court committed no error in overruling their demurrer to such answer.

This conclusion is sustained, we think, by the reported decisions of the courts of Massachusetts and New York, in construing statutes of those States containing provisions somewhat similar to those of the aforesaid act of March 25th, 1879. Thus, in *Lord* v. *Parker*, 3 Allen, 127, the Supreme Court of Massachusetts, in construing statutes of that State, containing provisions almost identical with those of the above quoted sections of the statute of this State, held that a married woman could not form a partnership with her husband, and was not liable upon a promissory note given by a firm, of which she and her husband had agreed to be members. Of such statutes, the court said: "They are in derogation of the common law, and certainly are not to be extended by construction. And we can not perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him. * * * The property invested in such an enterprise would cease to be her 'sole and separate' property." *Edwards* v. *Stevens*, 3 Allen, 315; *Ingham* v. *White*, 4 Allen, 412; *Plumer* v. *Lord*, 5 Allen, 460; *Plumer* v. *Lord*, 7 Allen, 481. To the same effect, substantially, are the following New York cases: *Perkins* v. *Perkins*, 7 Lansing, 19; *Kelso* v. *Tabor*, 52 Barb. 125; *Corn Exchange Ins. Co.* v. *Babcock*, 57 Barb. 222; *Chambovet* v. *Cagney*, 35 Super. Ct. 474.

The second error assigned by appellants is the decision of the trial court in sustaining the demurrer of Eliza L. Shaw to their reply to her plea of coverture. The substance of their reply was that the personal property mentioned in their complaint was sold and delivered "on the sole and separate account" of Eliza L. Shaw. This reply was a radical departure from appellants' complaint; and for this reason the demurrer to the reply was correctly sustained. *McAroy* v. *Wright*, 25

Ind. 22; *New* v. *Wamback*, 42 Ind. 456; *Bearss* v. *Montgomery*, 46 Ind. 544.

The next error complained of in argument by the appellants' counsel is the overruling of their demurrer to the answer of Daniel J. Shaw to their proceedings in attachment. In this answer Daniel J. Shaw alleged, in substance, that certain described articles of personal property had been attached and levied on by the sheriff of Shelby county, on the 20th day of October, 1880, by virtue of an order of attachment issued in this action; that after such personal property had been so attached and levied on by the sheriff, the appellee Daniel J. Shaw, being then and since a resident householder and head of a family, in Shelby county, in this State, on the 29th day of October, 1880, made a schedule of all the real estate, money on hands and on deposit, rights, credits and choses in action belonging to him, Daniel J. Shaw, or in which he had any interest, on the 20th day of October, 1880, being the same day the order of attachment was issued and came to the hands of such sheriff to be executed, or since that time to the 29th day of October, 1880, which schedule included all the articles of property described in such answer, and, also, certain other described articles of property and choses in action, of which property Daniel J. Shaw, in and by such schedule, claimed $600 worth as exempt from execution and from the appellants' proceedings in attachment, and therein and thereby demanded and required of the sheriff to have the same appraised, and therein and thereby named James C. Sleeth, a householder of the neighborhood and county, as such appraiser, in his behalf, to which schedule the affidavit of Daniel J. Shaw was attached, to the effect that the same contained a full and true account of all the personal property and real estate, within or without this State, choses in action, money on hand or on deposit, within or without this State, held by him or in which he had any interest on the 20th day of October, 1880, and that none of such property had been disposed of except, perhaps, a portion of the hay, corn and

potatoes, which inventory Daniel J. Shaw, on the 20th day of October, 1880, delivered to such sheriff and demanded of him such property to the amount of $600; that the sheriff appointed one Harry Sparks, a householder of the neighborhood, in conjunction with said Sleeth, to appraise such property (appellants having failed to appoint an appraiser), who appraised all of such property and choses in action, on the 30th day of October, 1880, at the sum of $341.70, as appears by such appraisement returned by the sheriff with the order of attachment; all of which articles of personal property Daniel J. Shaw claimed and designated, as exempt from execution and from such attachment proceedings, as part of his $600 exemption from execution and attachment, and which personal property, notes and judgment, he then claimed as exempt from such attachment proceedings.

It will be seen from this summary of the separate answer of Daniel J. Shaw, that, while it set forth in detail much irrelevant and unnecessary matter, it also alleged clearly and distinctly the material facts which, if true, and appellants' demurrer conceded their truth, entitled Daniel J. Shaw to claim the attached property, described in his answer, as exempt from the order of attachment. It was incumbent on him, if he desired to secure the benefit of the exemption law, that he should interpose by answer his claim to such exemption, before final judgment should be rendered in the attachment proceedings. In section 161 of the civil code of 1852, in force at the time (section 918, R. S. 1881), it was provided that the order of attachment should "require him," the sheriff, "to seize and take into his possession the property of the defendant in his county not exempt from execution." If, in any case, the defendant claimed that his attached property was "exempt from execution," and, therefore, not subject to seizure under an order of attachment, it was absolutely necessary that he should assert such claim before final judgment in the attachment proceeding. "Whether the property attached is subject to execution

is *res adjudicata*, after judgment in attachment. The judgment against the property is a judgment *in rem*, and is as conclusive as a judgment against the person." *State, ex rel.*, v. *Manly*, 15 Ind. 8; *Perkins* v. *Bragg*, 29 Ind. 507.

In section 22 of the bill of rights, in the Constitution of 1851, it is declared that "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." In section 703, R. S. 1881, in force since May 31st, 1879, it is provided that "An amount of property not exceeding in value six hundred dollars, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act."

In asserting his claim to the attached property, under the exemption law, in the case at bar, Daniel J. Shaw showed by the averments of his answer, that he was a resident householder and the head of a family in Shelby county; that he had made out and delivered to the sheriff of such county an inventory of all his property, and had made and subscribed the necessary affidavit, as required in and by section 714, R. S. 1881, in force since July 5th, 1861, and had demanded of the sheriff $600 worth of such property as exempt from the attachment; and that the appraisement of such property, which the sheriff caused to be made, amounted in the aggregate to a sum much less than $600.

We are of the opinion that the answer of Daniel J. Shaw stated facts sufficient to withstand the appellants' demurrer thereto, and to show that he was entitled to the benefit of the exemption law, and had the right to claim the articles of property, therein described, as exempt from seizure under the order of attachment. The privilege of the debtor to claim a reasonable exemption of property, from seizure or sale for

the payment of his contract debts, is a constitutional right, and the "wholesome laws," wherein such right is recognized and provision made for its exercise, must be liberally construed. Where, as in this case, the answer of the debtor shows that he has asserted his claim to an exemption, at the proper time and in substantial compliance with the requirements of the statute, it must be held to be sufficient on a demurrer thereto. Where the right to claim an exemption clearly exists, under the law, merely formal or technical objections will not be allowed to prevent the debtor from claiming the benefit of his exemption. In *Kelley* v. *McFadden*, 80 Ind. 536, it was said: "It is uniformly held that statutes of exemption are to be liberally construed. *Good* v. *Fogg*, 61 Ill. 449; *Kuntz* v. *Kinney*, 33 Wis. 503; *Carty* v. *Drew*, 46 Vt. 346; *Allison* v. *Brookshire*, 38 Tex. 199; *Seeley* v. *Gwillim*, 40 Conn. 106." The right of Daniel J. Shaw to claim the benefit of an exemption, in the case in hand, is not controverted by the appellants, and the only objections pointed out to his answer are purely technical and do not affect, in any manner, the substantial rights of the parties. The answer was sufficient, and the demurrer thereto was correctly overruled.

The last error assigned is the decision of the circuit court in sustaining the demurrer of Daniel J. Shaw to the appellants' reply to his separate answer to their proceedings in attachment. In this reply, the appellants alleged, in substance, that at the commencement of this suit and the delivery of the order of attachment therein to the sheriff of Shelby county, Daniel J. Shaw was the owner and holder, in his own name and right, of $2,500 in money and $2,500 in notes and accounts, and other personal property of the value of $2,500, a description of which was unknown to appellants; that at the time aforesaid Daniel J. Shaw had fraudulently concealed, in the possession of persons whose names were unknown to appellants, and in the name and possession of his co-appellee,

Eliza L. Shaw, in addition to the sums aforesaid, the sum of $2,500 in money, also $2,500 in notes and accounts, and also other personal property of the value of $2,500, a description of which was unknown to appellants; all of which property, notes, accounts and money were fraudulently concealed and withheld from the sheriff and the inventory of property delivered to him by Daniel J. Shaw, and were fraudulently concealed and omitted from the list of property, mentioned in his answer, for the purpose of cheating and defrauding the appellants, and for the fraudulent purpose of excepting the property, mentioned in his answer, from the attachment proceedings; that all the property, mentioned in such answer, was subject to such attachment and should be sold by order of the court for the payment of appellants' debt; and that the same was of the reasonable value of $1,000; wherefore, etc.

The court committed no error, as it seems to us, in sustaining the demurrer of Daniel J. Shaw to this reply. Conceding the exact truth of each and every facts alleged in the reply by the appellants, precisely as such facts are stated, it is very clear, we think, that they do not meet the case made by the answer of Daniel J. Shaw, nor show any reason whatever for denying him the right to claim the property described therein as exempt from seizure under the order of attachment. The property attached by the sheriff was the only property of Daniel J. Shaw which could be reached by the attachment proceedings in this cause; and his right to claim such property as exempt from seizure under the attachment did not depend, in any degree, upon the quantity or value of other property he might possess, or upon the disposition he had made of such other property, whether fraudulent or otherwise. If he were a resident householder of the county, and if the attached property, claimed by him as exempt from seizure under the attachment, were of a value not exceeding $600, and if it appeared that he had substantially complied with the requirements of the exemption law, he had the un-

doubted right, as it seems to us, to claim and hold such attached property as exempt from seizure under the attachment; and such right would not be defeated, nor would he be precluded from the exercise of such right by any or all the facts alleged by the appellants in their reply to his separate answer. *Douch* v. *Rahner*, 61 Ind. 64.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment below.

The judgment is affirmed, with costs.

Filed May 29, 1883.

## On Petition for a Rehearing.

Elliott, J.—It is a familiar rule that statutes in derogation of the common law are to be strictly construed, and our statute of 1879, concerning the rights and liabilities of married women, is certainly in derogation of a long established rule of the common law courts. Our own cases have, with a marked degree of uniformity, held to the doctrine that a married woman has not the capacity to bind herself by any executory contract, except where the statutes have enlarged her capacity. We are not at liberty, therefore, to extend by a liberal construction the act of 1879, which so radically changes the common law rule. That act does not in terms, nor by necessary intendment, authorize her to enter into a partnership with her husband. Property in a partnership is not "sole and separate." The ownership is a joint one. The property is owned, not by the partners individually, but by the partnership. Many familiar examples illustrate the difference between individual and partnership ownership. Thus, partnership creditors are entitled to payment out of partnership property, to the exclusion of individual creditors. A widow of one partner has no interest in partnership real estate until the debts of the partnership have been paid. In legal contemplation, such real estate is, as against the widow, personal property and assets of the partnership. *Cobble* v. *Tomlinson*, 50 Ind. 550; *Huston* v. *Neil*, 41 Ind. 504. A partner can

not claim partnership property as exempt from execution, for the reason that he has no individual interest in it. *Love* v *Blair*, 72 Ind. 281; *Smith* v. *Harris*, 76 Ind. 104. Examples might be multiplied, but these are sufficient to show that partnership property is not the "sole and separate" property of a partner. As the enabling act of 1879 applies only to the married woman's separate property, we can not, without doing violence to its language, hold that it confers a right to contract in reference to partnership property. The language used is plain, and our duty is to interpret and not to construe. We can do no otherwise than hold that the words "sole and separate property" refer to the individual property of the wife, and not to property owned by a partnership.

The courts of Massachusetts and New York have given this question careful consideration, as is shown in the cases cited in the original opinion, and have reached the same conclusion as that to which we have been led. A recent writer says: "The enabling statutes confer new rights and powers, but they are limited to those necessary for the protection of her separate estate, and she has not the power to contract generally, unless the statutes expressly, or by necessary implication, gave her that power." Kelly Contracts of Married Women, 127, *n*. Many authorities are cited in support of this proposition, and we find that they do give the text full support. If this is the correct rule, and that it is we do not doubt, it is very clear that our statute of 1879 confers no power upon a married woman to bind herself by an executory contract concerning partnership property, for it, in terms, restricts her power to her "sole and separate property."

Petition for a rehearing overruled.

**Filed Nov. 21, 1883.**

No. 10,896.

## ELLIOTT ET AL. *v.* CHAMP.

CONTRACT.—*Execution.*—*Complaint.*—The signing alone by one party of a writing purporting to be an agreement, without delivery to or acceptance by the other party, is not an execution of the agreement, and in an action by the latter thereon a complaint which fails to aver an acceptance or delivery is insufficient on demurrer.

From the Fulton Circuit Court.

*J. Conner*, for appellants.

*M. L. Essick* and *G. W. Holman*, for appellee.

BICKNELL, C. C.—The appellants brought this suit upon a writing signed by the appellee.

A copy of the writing is made part of the complaint and is as follows:

"ROCHESTER, INDIANA, December 31st, 1880.

"I, the undersigned, agree to place the following land (describing it) in the hands of Messrs. Elliott & Bitters, real estate agents of Rochester, Indiana, and authorize them to negotiate its sale at the following prices and terms: $3,000, $800 cash and balance in five equal annual payments, with notes at 6 per cent. interest, secured by mortgage on the land sold, for which I will allow, as commission, if sale be effected, $150, payable out of the first purchase-money. I also agree to place said property in the hands of no other agent or agents for the period of 12 months and thereafter until withdrawn, and should I myself effect a sale of said property during the continuance of this agreement, I hereby agree to pay said Elliott & Bitters the above commission in full.

(Signed) "JOSEPH CHAMP."

The complaint averred that the defendant did himself sell the property during the continuance of said agreement, whereby under the last clause thereof $150 became due the plaintiffs.

A demurrer to the complaint for want of facts sufficient was sustained; judgment was rendered thereon for the de-

fendant. The plaintiffs appealed. The ruling upon the demurrer is assigned as error.

Signing alone by one party, without delivery to or acceptance by the other, is not an execution of an agreement. *Mahon* v. *Sawyer*, 18 Ind. 73; *Cline* v. *Guthrie*, 42 Ind. 227 (13 Am. R. 357); *Prather* v. *Zulauf*, 38 Ind. 155; *Ritenour* v. *Mathews*, 34 Ind. 279. In *Petty* v. *Board, etc.*, 70 Ind. 290, the complaint alleged that the defendant had subscribed a "heading in writing, as follows," and then set out the contract of subscription signed by the defendant, but it alleged neither execution nor delivery. The complaint was held insufficient, because subscribing an instrument does not imply its delivery. The court said: "A man may subscribe a promissory note, yet, until its delivery, it has no binding force."

The complaint in the case before us contains no averment that the writing sued on was delivered to or accepted by the plaintiffs. There was therefore no error in sustaining the demurrer to the complaint.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Nov. 24, 1883.

---

No. 8652.

## THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY *v.* SWINNEY, EXECUTRIX.

SUPREME COURT.—*Appeal.—Plea in Bar.—Demurrer.—Estoppel by Record.—Estoppel in Pais.—Two Actions for Same Cause.*—A plea in bar of an appeal set forth, that before the commencement of the action in which the judgment was rendered from which the appeal was taken, the appellant had appropriated land for the use of a railway corporation; that an appraisement was made according to law; that exceptions were filed to the appraisement; that trial was had in the A. Circuit Court and judg-

ment rendered for appellee's testator in a sum in excess of the appraisement; that the case was appealed to the Supreme Court and the judgment reversed; that after the reversal the venue was changed to W. county, where appellant, over appellee's objection, dismissed the condemnation proceedings; that thereupon appellee instituted this action in the superior court of A. county, and recovered the judgment from which this appeal is prosecuted; that an appeal was taken by appellee from the order dismissing the condemnation procedings; that after the appeal of appellee had been perfected, the appellant, in the present case, filed a plea in bar of appellee's appeal, alleging therein the recovery of the judgment in this cause; that it was for the same cause of action involved in the condemnation proceedings; that this plea of appellant was held good on demurrer, and appellee failing to reply, the Supreme Court gave appellant judgment on demurrer and dismissed the appeal.

*Held*, on demurrer to such plea, that the facts pleaded do not constitute an estoppel by record, or *in pais*.

*Held*, also, that what appellant did do was simply to assert the legal right to be relieved from the burden of waging two suits for the same cause of action.

From the Allen Circuit Court.

*T. A. Hendricks*, *A. W. Hendricks*, *C. Baker*, *O. B. Hord*, *A. Baker*, *E. Daniels*, *J. Brackenridge* and *J. R. Carey*, for appellant.

*L. M. Ninde*, *J. I. Best* and *P. A. Randall*, for appellee.

ELLIOTT, J.—The appellee pleads in bar of this appeal, that before the commencement of the action in which the judgment was rendered from which the appeal is prosecuted, the appellant had appropriated land for the uses of the corporation; that an appraisement was made pursuant to the provisions of the statute; that exceptions were filed to the appraisement; that a trial was had in the Allen Circuit Court, and judgment rendered for the appellee's testator in a sum greatly in excess of the appraisement; that the case was appealed to this court and the judgment reversed; that after the reversal the venue was changed to Whitley county, where the appellant, over the appellee's objection, dismissed the condemnation proceedings; thereupon the appellee instituted this action in the superior court of Allen county, and recovered the judgment from which this appeal is prosecuted; that an appeal

was taken by appellee from the order dismissing the condemnation proceedings; that after the appeal of appellee had been perfected, the appellant, in the present case, filed a plea in bar of appellee's appeal, alleging therein the recovery of the judgment in this cause; that it was for the same cause of action involved in the condemnation proceedings; that this plea of the appellant was held good on demurrer, and, the appellee failing to reply, this court gave appellant judgment on demurrer and dismissed that appeal.

The question now before us is whether the appellee's plea is sufficient to withstand appellant's demurrer.

It is plain that there is no estoppel by record. No issue has been joined or tried, no judgment or decree has been pronounced, involving or determining the point here in controversy in favor of either party; nor is there any recital in any deed or record binding the parties. In no form is there an estoppel of record.

We find absent essential elements of an estoppel *in pais*. There is not knowledge on one side of material facts and want of knowledge on the other; there is no advantage taken of position, for the parties are not only at arms-length, but they are antagonists in an open contest; there is no concealment of facts and there are no untrue statements; there is no assertion of a right which implies the loss of some other right; nor yet is there any taking of a legal right from the appellee.

The appellant, in invoking the assistance of the court to prevent the appellee from prosecuting two actions, asserted an undoubted legal right. In the assertion of this legal right the appellant did not take from appellee any right, for the plain reason that she had no right to two actions; a right to one she doubtless has, but not to more than one.

That which appellant did do was to assert an unquestionable legal right in a perfectly legal method, and we know of no principle of law or of ethics which imposes a penalty upon a litigant who asserts a right given him by law in a law-

ful and rightful manner. The right to prevent the maintenance of two actions is one which may well be exercised without conceding anything more than that there is another action in which the whole controversy may be settled. It is inconceivable that a party may have a plain legal right and a known remedy for the vindication of that right, and yet not be at liberty to assert it except at the expense of the loss of another legal right. It can not be possible that a clear legal right to prevent a wrong can only be made available upon the terms that another right be surrendered. A legal right may be vindicated without a sacrifice; to aver the contrary is to assert that a right is not a right, and this is self-destructive.

In asking to be relieved from the burden of waging two legal controversies at the same time, for the same cause, there is no concession that one of them is justly waged; the extent, and the whole extent, of the concession is that there is a right to have one action settle the entire controversy. The party invoking the assistance of the court does not affirm the validity or justice of his adversary's claim, but demands that the question whether he has or has not a claim shall be settled in one action. It is not granted, expressly or impliedly, that the adversary shall be held victor without a struggle, but it is asserted that the whole contest shall be fought out in a single suit. What is asked is that the entire controversy shall be confined to one legal contest; what is conceded is that there is a right to fight it out in that one contest. The fallacy pervading appellee's entire argument is the undue assumption that the appellant, by praying the court to restrict her to one action, on the ground that she had secured a judgment, impliedly conceded that the judgment is unimpeachable. This assumption can not be made good, and the ground falls away from the whole argument. The appellant bases this claim, not upon the ground that there is a judgment ending all controversy, but upon the right to have the controversy confined to a single action. The foundation of the claim is not the

merger by judgment, but the right to make one action the theatre of the whole legal war.

No more is granted than that there is a right to one suit. This is so because, at the very time the appeal was made to prevent the illegal embarrassment by two actions, the party was in open and avowed hostility against the judgment; was actually and openly engaged in an assault upon its validity. The attitude occupied was not that of one confirming, but that of one disputing; the situation was that of one assailing, not that of one surrendering. The right to put the appellee to one action did not involve the surrender of a position rightfully occupied. No such condition is annexed to the exercise of the right to demand the confinement of the legal warfare to one field. The appeal from appellee's judgment was an avowal of opposition, was a direct assault, and it is difficult to perceive how it can be said that, while still holding that appeal and still avowing that opposition, the appellant affirmed that the judgment was valid.

There has been no election between inconsistent positions. The appellant had two distinct rights, both self-existent, one to continue his assault upon the judgment by maintaining its appeal; the other to demand that the appellee be confined to one action. These are not dependent rights; each has a separate and independent existence. The exercise of one does not involve the sacrifice of the other. It is not inconsistent for an appellant to demand that he be not harassed by many actions, and yet press his appeal. In beating off one action wrongfully prosecuted, the right secured by the appeal, that of questioning the judgment appealed from, is not surrendered. There is no inconsistency because there is no affirmation of the validity of the judgment in the one position and a denial in the other; on the contrary, there is a persistent and unyielding denial.

If, however, it were conceded that there is an inconsistency between the positions occupied by the appellant, then, so far

as we are informed by the record, no harm was done appellee; for, if she has a cause of action, the suit left to her, namely, the one out of which grows the present appeal, affords her ample remedy for the redress of her wrongs and the establishment of her right of action. It may be her right to maintain one action, but she can not have two. On this subject Bigelow says: "It will be seen from these cases that the rule requiring consistency of action before the courts is no arbitrary rule, but one demanded, as was suggested at the opening of this chapter, by the very object of courts of justice. Where then no wrong would be done to the court or to other parties to a cause by permitting a change of position, a change should in principle and will in fact be allowed." Bigelow Estop. 604.

If the two actions are not for one and the same cause of action, then the error was in sustaining the demand of appellant to dismiss the appeal taken by the appellee from the Whitley county case. If there was error there, the remedy is to be sought by relief from that judgment; not by securing the commission of error in the present case.

The position occupied by the respective parties exerts an important influence upon the case. The appellant never left its position of hostility to the judgment; from first to last it stood as an assailant. How, then, can it be said there was a concession that its judgment is unimpeachable? This element broadly and plainly distinguishes the present case from the long line of cases cited in the course of the argument. In many of those cases the defendants confessed the right of action stated against them, and avoided it by averring that it had been put into a judgment, and, in doing this, necessarily affirmed the validity of the judgment. This is not the case here, as we have already seen. Nor did the defendants in those actions occupy a position of hostility to such judgments. They were not questioning their validity in any form. On the contrary they expressly affirmed the conclusiveness of those

judgments, by averring that they had taken up the plaintiff's claim. This can not be so here, because the appellant was seeking the overthrow of the judgment at the very time that it asked to enforce its right to protection against a multiplicity of actions. The other cases cited in argument are to the effect that one who has recovered judgment in one character or capacity can not afterwards assert that the character or capacity in which he succeeded was not the true one, and are obviously not in point here; for here no attempt is made to change character, but the appeal to prevent the prosecution of a second action was made while in the position of hostility. The appellant has not receded a single step from its persistent and avowed hostility to the judgment appealed from, but has steadily maintained that character, and it can not, therefore, be said that there has been any attempt to shift position or change character.

If the appellee may prosecute two actions she may prosecute many, and the appellant is, upon appellee's theory, bound to submit to endless litigation or lose the right secured by the appeal. This result would be a most deplorable one, and is, if possible, to be avoided, for the law abhors a multiplicity of actions. The result to which the theory would lead furnishes in itself a strong argument against the soundness of the theory, and exhibits its antagonism to just principles. We come back after all to the fundamental proposition that an appellant having a plain, absolute legal right, self-existent and independent, may assert it in a legal method, without the peril of losing another right which he has secured by strict compliance with the law of the land.

Demurrer to the plea sustained.

ZOLLARS, J., did not take any part in the decision of this case.

Filed Nov. 9, 1883.

No. 10,741.

## THE STATE, EX REL. DUNHAM, *v.* ROCHE, ADMINISTRATOR, ET AL.

GUARDIAN AND WARD.—*Compensation for Education of Ward.—Judgment.*—A guardian has no claim to credit against his ward's estate for money expended for board and education, unless it appears that there was no parent of the ward able or willing to provide therefor, and that the ward's estate justified the expenditure; and an answer to an action on the guardian's bond, claiming credit for such expenditures, which fails to aver such facts, although a judgment by confession had been taken for such a claim against the guardian, is insufficient.

PRACTICE.—*Cost Bond.*—Non-resident relators, for whose use suit is brought, may be compelled to give security for costs.

From the Huntington Circuit Court.

*W. H. Trammel* and *T. L. Lucas*, for appellant.

*S. E. Sinclair* and *H. C. Hanna*, for appellees.

HAMMOND, J.—Action by the State of Indiana, on the relation of Cynthia E. Dunham, against the administrator of Elam A. Mahon, deceased, Samuel T. Morgan and Thomas B. Hedekin. The suit is upon a bond alleged to have been executed by Mahon, as guardian of the relatrix, and by Morgan and Hedekin, as sureties, in proceedings had upon petition for the sale of the relatrix's real estate. The complaint charges that the guardian, under the proper order of court, sold the real estate for $900, and converted the money derived therefrom to his own use.

Upon the issues made there was a trial by jury resulting in a verdict for the appellees, and over the appellant's motion for a new trial, judgment was rendered on the verdict.

The appellant's demurrer, alleging that the facts stated were not sufficient to constitute a defence to the appellant's complaint, was overruled to the second paragraph of Hedekin's answer. The ruling was excepted to by the appellant, and is assigned as error in this court.

The following is a copy of the pleading complained of:

"For a second and further answer to plaintiff's complaint, the defendant Thomas B. Hedekin says that Elam A. Mahon, deceased, filed his report as guardian of said relatrix on the 10th day of February, 1872, showing a balance in his hands of $178.41 belonging to his ward; that it was the last report he filed before his death, and that it was approved by the Honorable Judge of the Huntington Circuit Court; that from the time of the filing of the said last report to the time of his death there came into his hands the additional sum realized as the proceeds of the sale of the real estate of his ward, described in plaintiff's complaint.

"That Elam A., as the guardian of said relatrix, was indebted to Ruth Bryan for the tuition and board of his said ward; that on the 28th day of December, 1872, said Ruth Bryan filed her complaint in said Huntington Circuit Court, in which she demanded $1,000 from said Elam A. Mahon, for the tuition and board of Lillie Mahon, whose proper name was Cynthia E. Dunham, and the same person as the relatrix; that the same was due said Ruth Bryan from the estate of said ward, but there being no money in said Elam A.'s hands belonging to said ward at the time, he, the said Elam A., on the 10th day of June, 1873, confessed a judgment against himself in favor of said Ruth Bryan for $1,068, which judgment was assigned by said Ruth Bryan to Samuel R. Alden for a valuable consideration before the bringing of this action; that the same remained in full force up to the time of his death, and became a lien upon his estate, which was ample to pay said judgment; that after his death Thomas Roche, his administrator, paid on said judgment, on the 6th day of August, 1877, the sum of $200, and on the 3d day of May, 1879, the further sum of $400; that on the 26th day of July, 1878, said administrator paid to Samuel Morgan, who was then the guardian of said relatrix, the sum of $35, and on the 26th day of April, 1879, the further sum of $275; that said several sums of money paid for the benefit of said relatrix by said administrator, and said judgment confessed by said Elam

A. Mahon, deceased, for the benefit of said ward, amount to more than the money in his hands belonging to his said ward, including the amount realized from the sale of the real estate by said Elam, described in plaintiff's complaint. Wherefore he demands judgment for his costs in this action."

Section 6 of the guardians' act (section 2518, R. S. 1881) reads:

"Every guardian so appointed shall have the custody and tuition of such minor, and the management of such minor's estate during minority, unless sooner removed or discharged from such trust: *Provided*, That the father of such minor (or if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control of the education of such minor."

The sixth clause of section 9 of the same act, section 2521, R. S. 1881, provides that "When any ward has no father or mother, or such father or mother is unable or fails to educate such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify."

"In all cases of delinquency and neglect, the courts will presume in favor of the ward and against the guardian, as strongly as the facts will warrant." *Jennings* v. *Kee*, 5 Ind. 257. A guardian can not make any contract with his ward except for necessaries for the ward, that the latter may not repudiate when he arrives at age. In a suit upon a guardian's bond for money not accounted for, neither he nor his sureties can be relieved from liability unless it is shown that the money has been applied strictly in compliance with the law. *Myers* v. *State, ex rel.*, 45 Ind. 160; *Corbaley* v. *State, ex rel.*, 81 Ind. 62.

We think that the second paragraph of Hedekin's answer was not sufficient, and that the demurrer thereto should have been sustained. There is no averment that the relatrix had no father or mother at the time the guardian provided board and tuition for her; nor that they were unable or unwilling to furnish her such board and tuition; nor are facts stated

showing that the ward's estate justified the expenditure charged for. As bearing more or less upon these questions, the following authorities, in addition to those above, are cited: *State* v. *Clark*, 16 Ind. 97; *State, ex rel.*, v. *Sanders*, 62 Ind. 562; *Yost* v. *State, ex rel.*, 80 Ind. 350; *Glidewell* v. *Snyder*, 72 Ind. 528; *Brown* v. *Yaryan*, 74 Ind. 305; *Marquess* v. *LaBaw*, 82 Ind. 550; 1 Bl. Com. 462; Reeve Dom. Rel. 324.

It is complained that the court required the relatrix to give surety for costs on account of her non-residence. There was no error in this. Relators, for whose use an action is brought, are liable for costs. Section 593, R. S. 1881. A non-resident plaintiff is required to file a cost bond. Section 589, R. S. 1881. This should be held to apply to a non-resident relator for whose use an action is brought. He is beyond the reach of a fee bill or an execution issued in this State; and the reason for requiring him to give security for costs for actions commenced by him in this State has as much force against him as other non-residents bringing suits in our courts.

Other alleged errors are complained of, but as they are not likely to occur in another trial, they need not be considered.

Judgment reversed, at the appellee's costs, with instructions to the court below to sustain the demurrer to the second paragraph of Hedekin's answer and for further proceedings in accordance with this opinion.

Filed Nov. 20, 1883.

---

No. 10,120.

91 409
153 189

## Dufour et al. *v.* Kious.

**Judgment.**—*Costs.*—*Transcript.*—*Lien.*—A general judgment for costs of the suit carries all costs accrued of the party in whose favor the judgment is rendered, as well as such costs afterwards accruing, whether an amount be specified in the judgment entry or not, and a transcript of such judgment filed in the clerk's office of another county, and recorded and entered in the judgment docket, as specified in sections 610, 611, R. S.

1881, makes such judgment a lien on the debtor's lands in the latter county for the whole amount embraced thereby, though such amount be in no manner specified.

From the White Circuit Court.

*W. F. Hays, J. D. Works* and *J. A. Works*, for appellants.

*A. W. Reynolds* and *E. B. Sellers*, for appellee.

BLACK, C.—The appellee sued the appellants Abner P. Dufour, Eliza M. Dufour and James Hay, sheriff of White county.

The complaint alleged that on the 17th day of August, 1878, in an action then pending in the Switzerland Circuit Court, wherein Charles A. Clarkson and Mary E. Scandritt were plaintiffs and said Eliza M. Dufour and others were defendants, said Abner and Eliza recovered a judgment against said Clarkson and Scandritt for partition of certain real estate and costs; that on the 29th of August, 1881, an execution for costs amounting to $277.50 was issued on said judgment to the sheriff of White county, against the property of said Clarkson and Scandritt, the appellee Hay then and still being sheriff of said county; that he levied said execution on certain land described, in said county of White, which levy was endorsed on said execution; that said sheriff, in pursuance of said levy, advertised that on the 5th of November, 1881, he would, by virtue of said execution, sell the premises so levied upon at public auction, at the door of the court-house in Monticello, Indiana, for the satisfaction of said execution and costs; that long prior to the receipt of said execution by said Hay, the appellee was, and he ever since had been and still was the owner in fee simple in his own right of said real estate so levied upon; that there was no amount of costs fixed or adjudged by the court in the judgment in said cause, except the sum of $275, which was paid September 10th, 1878; that a transcript of said judgment was filed and recorded in the clerk's office of White county, on the 23d of August, 1878; that said transcript did

not then or at the commencement of this suit include any sum for costs, nor did the clerk's certificate state the amount of the costs, nor was there any sum taxed therein or thereon, except the amount herein stated and alleged to have been paid; that the records in the clerk's office of White county did not show the amount of costs or any costs, except as herein stated.

Prayer that said levy be set aside, and for a temporary injunction and a perpetual injunction. The complaint was verified and an undertaking was filed. A temporary injunction was granted.

The appellants demurred to the complaint for want of sufficient facts. The demurrer was overruled, and the appellants having elected to stand by their demurrer, judgment was rendered against them.

The only question before us is that raised by the demurrer to the complaint.

The judgment for costs rendered in the Switzerland Circuit Court did not constitute a lien on land in White county, and if such land, owned by a judgment defendant at the time of the rendition of the judgment, were afterward conveyed without fraud, which ought not to be presumed, and the appellee became the owner thereof before the levy of an execution thereon, the land would not be liable to sale on such an execution, if the statutory mode of making a judgment rendered in a court of one county a lien on land in another county had not been pursued before the transfer of the land from the judgment defendant.

A judgment so rendered in one county may be made a lien on real estate of the judgment debtor in another county, as fully as if such judgment had been rendered in the latter county, by filing in the office of the clerk thereof a certified copy of the judgment, and causing it to be recorded and entered in the judgment docket, as provided by sections 528, 529, code of 1852; sections 610, 611, R. S. 1881.

If the judgment of the Switzerland Circuit Court was so

made a lien on the land in question it would be liable to sale on the execution mentioned, though before the receipt of the execution in White county the appellee had become the owner of the land without fraud. *Berry* v. *Reed*, 73 Ind. 235; *Bell* v. *Davis*, 75 Ind. 314; *State, ex rel.*, v. *Record*, 80 Ind. 348.

It is not necessary, in a judgment for costs, to specify their amount or any portion thereof, and if judgment be rendered against one for the costs of the action, and a definite sum be specified in the entry, either as the amount of the costs or as for a particular item thereof, it will not, therefore, follow that the judgment debtor is not further liable for costs. The judgment will embrace those costs which have not yet accrued at the time of its rendition as well as those then accrued. *Palmer* v. *Glover*, 73 Ind. 529; *Pittsburgh, etc., R. W. Co.* v. *Town of Elwood*, 79 Ind. 306.

The complaint, prepared for verification, was carefully drawn. Unless it presented ground for invoking the strong arm of equity, the defendant should not have been put to his answer, though thereby he might easily have removed all the obscurity of the complaint, and shown clearly the existence of facts which should have been negatived by the complaint.

The complaint showed that the sheriff had levied the execution on land owned by the plaintiff, and which he had owned before the receipt of the execution by the sheriff. It was alleged that the judgment on which the execution issued was one for costs rendered against persons not parties to this action; that the judgment was rendered on the 17th of August, 1878; that on the 23d of the same month a transcript of said judgment was filed and recorded in the clerk's office of White county. It was not alleged that the land levied on was not owned by a judgment defendant when the transcript was filed, or that the judgment did not become a lien on the land, or when the appellee became the owner of the land. It was stated that on the 10th of September, 1878, a certain amount of costs was paid, and that this amount and no other was designated in the judgment for costs. The pleader failed

to aver that the sum so designated and so paid was the whole amount of the judgment, or the whole amount of the costs of said Abner and Eliza in said action, or that all their costs therein had been paid, or that the judgment had been paid.

What is said in regard to said specific sum amounts to a statement that such sum was designated in the judgment, and that no other amount was designated specifically; but it does not appear that this was the whole amount of the judgment. And the ground on which relief is asked is not that the judgment does not constitute a lien on the land, if anything is due on the judgment, but that the judgment being one for costs, designated a certain amount as taxed for costs, and that such amount has been paid upon the judgment.

Counsel for appellants state in their brief that the amount so specified constituted one item of the costs, being the costs of a struck jury. This does not appear in the complaint, but it is not inconsistent with the averments of the complaint.

It should have been shown, with reasonable certainty, either that the judgment did not constitute a lien on the land, or that it had been fully paid.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellee, and the cause is remanded with instructions to sustain the demurrer to the complaint.

Filed Oct. 13, 1883. Petition for a rehearing overruled Nov. 24, 1883.

---

| | |
|---|---|
| 91 | 413 |
| 133 | 390 |
| 91 | 413 |
| 142 | 259 |
| 142 | 328 |
| 143 | 71 |

No. 10,720.

## CONLEY *v.* DIBBER.

PLEADING.—*Practice.*—*Harmless Error.*—Where a demurrer is erroneously overruled to an answer, and the complaint is thereafter amended, such ruling is thereby rendered harmless.

VENDOR AND VENDEE.—*Encumbrance.*—*School Fund Mortgage.*—*Release by County Auditor.*—The auditor of the county has no authority to release

a school mortgage unless the money is paid, and where a party is entitled by his contract to an unincumbered title, he is not compelled to accept a conveyance of land thus encumbered, though the auditor has released the mortgage of record.

ASSIGNMENT OF ERROR.—*Pleading.—Estoppel.*—Where the court erroneously sustains a demurrer to the reply to a single paragraph of the answer, and the defendant thereafter offers to withdraw such paragraph, but the court, at the instance of the plaintiff, refuses to allow such withdrawal, the plaintiff will not thereafter be allowed to assign error upon such ruling.

From the Ohio Circuit Court.

*A. C. Downey*, for appellant.

*J. B. Coles*, for appellee.

BEST, C.—This action was brought by the appellant against the appellee for the specific performance of a contract.

The complaint averred that the appellant had sold and the appellee had bought of appellant, on the 28th day of May, 1868, ninety-seven acres of land, at the price of $30 per acre; that the appellee took possession of said land in pursuance of said contract, and afterwards the appellant conveyed a portion of said land to the appellee, for which he at the time paid him; that both parties then supposed that said deed embraced all the land so sold, but that afterwards it was discovered that a portion of the land so sold was omitted from said conveyance, and that the purchase-money of the omitted portion has not been paid; that immediately thereafter the appellant tendered a sufficient deed for the entire premises, and demanded payment for the omitted portion, which, with the interest thereon, amounts to $40, but that the appellee refused to make the payment. Wherefore, etc.

A demurrer to the complaint was overruled, and an answer of five paragraphs was filed. A demurrer was sustained to the second and overruled to the remaining paragraphs of the answer, to which each party reserved exceptions. Thereafter the appellant amended his complaint, and the appellee re-filed his answer. The record does not so state, but the second answer appears to be a copy of the first. After this the appel-

lant demurred to the third paragraph of the answer. This demurrer was overruled, and a reply was filed to this paragraph of the answer, to which a demurrer was sustained. A reply of two paragraphs, and a demurrer to the second paragraph of the reply, were filed before the answer was filed to the complaint as amended, and thereafter the demurrer was sustained to the second paragraph of the reply. A cross complaint, answer, and reply thereto were also filed. When the cause upon the issues thus formed was reached for trial, the appellee dismissed his cross complaint, and asked leave to withdraw the third paragraph of his answer, but upon the appellant's objection, this leave was refused, and appellant declining to offer any evidence, judgment was rendered against him.

The errors assigned in this court are these:

1st. That the court erred in overruling the demurrer to the first, second and third paragraphs of the answer;

2d. That the court erred in sustaining the demurrer to the second paragraph of the reply; and,

3d. That the court erred in sustaining the demurrer to the reply to the third paragraph of the answer.

The first assignment of error calls in question the ruling of the court upon the demurrer to the several paragraphs of the answer before the complaint was amended and before the answer was re-filed. The appellee insists that these rulings are rendered wholly unimportant by the subsequent amendment of the pleadings, and we agree with him in this conclusion. The fact that the appellant deemed it necessary to amend his complaint would seem to be a concession that it was insufficient, and, if so, the ruling upon the demurrer was proper. However this may be, the amendment of the complaint entirely superseded this ruling and rendered it harmless. Buskirk Prac., p. 89, and authorities cited.

The second assignment calls in question the ruling upon the demurrer to the second paragraph of the reply. This reply was filed before the last answer was filed, and it is doubt-

ful, in this condition of the record, whether the ruling presents any question, but inasmuch as the ruling was made after the answer was filed, we will treat it as a reply to the answer. The first paragraph of the answer to which this reply was directed averred that the appellant had agreed to convey the land in question by an unincumbered title, and that he did not do so, nor was he able to do so, for the reason that the land was at the time, and still is, encumbered by a mortgage of $300, executed to the State for school funds. The reply was that the auditor of the county had agreed to release this land, and in pursuance of the agreement had released all embraced in the first conveyance, and since the commencement of the suit had released the portion in question, and had dated the release as of the date of the former release. This reply the appellee insists was not sufficient, for the reason that it was not averred that said mortgage had been paid, and without payment the auditor had no authority to release the mortgage. This position we think well taken, and for this reason the reply was insufficient. A release of the mortgage without payment would not remove the encumbrance, and, under the contract as averred, the appellee was not compelled to accept the conveyance and pay the purchase-money while the land remained encumbered. There was, therefore, no error in this ruling.

The third assignment calls in question the ruling upon the demurrer to the reply to the third paragraph of the answer. This paragraph the appellee, after the issues were formed, offered to withdraw, and this was prevented by the objection of the appellant. Under these circumstances, he will not be heard to say that an error was committed against him by sustaining a demurrer to his reply. If such error was committed, it would have been corrected by a withdrawal of the paragraph, and as that was not done because of the appellant's objection, the cause will not be reversed to accomplish such purpose. For these reasons we think there is no available error in the record, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed Nov. 24, 1883.

No. 11,201.

## ROY *v.* THE STATE.

INTOXICATING LIQUOR.—*Sale on Sunday.—Indictment.—Time.*—An indictment for selling liquor on Sunday charged that the act occurred "on the 20th of June, 1883. * * Said 20th of June being the first day of the week, commonly called Sunday." The date given was Wednesday.

*Held*, that the indictment was good.

From the Criminal Court of Marion county.

*A. F. Denny*, for appellant.

*F. T. Hord*, Attorney General, *W. T. Brown*, Prosecuting Attorney, and *C. F. Robbins*, for the State.

HAMMOND, J.—Indictment; arraignment; plea of not guilty; trial by the court and conviction of the appellant, under section 2098 of R. S. 1881, upon a charge of selling intoxicating liquor upon Sunday, to be drank as a beverage.

Motions made by the appellant at the proper time to quash the indictment, for a new trial, and in arrest of judgment, were severally overruled and exceptions taken.

The sufficiency of the indictment, and also the sufficiency of the evidence to sustain the finding of the court, are called in question by the assignment of errors.

The indictment charges that the offence was committed "on the 20th day of June, 1883. * * * Said 20th day of June being the first day of the week, commonly called Sunday."

As we judicially know that the 20th day of June, 1883, was not Sunday, but Wednesday, it is earnestly insisted, by the learned counsel for the appellant, that the error of date renders the indictment fatally defective.

The time of the alleged commission of an offence must be stated in the indictment. It is not necessary, however, for the proof to correspond with the date as stated. If the evidence shows that the offence was committed within a period which does not bar its prosecution by the statute of limitations, it is sufficient upon this point.

The gist of the offence charged in the indictment consists in doing the act charged on Sunday. With respect to the day of the month, no more particularity is required in an indictment for an offence like this than for other offences. Thus, in *Pancake* v. *State*, 81 Ind. 93, which was a prosecution for selling intoxicating liquor on Sunday, on a date specified in the indictment, it was held that proof of the precise day was immaterial, and that it was sufficient if the sale was shown to have taken place on some Sunday at any time within two years prior to the return of the indictment.

Mr. Bishop, in his Criminal Procedure, vol. 1, section 399, says, generally, that it is unimportant on what day of the week a wrongful act is done, and it need not be alleged. But, if an offence consists, for instance, in doing a thing on Sunday, the indictment, in addition to the day of the month and year, must aver it was Sunday, and not merely mention a day found to be Sunday by the calendar. If the day of the week is thus properly set out, the indictment will be good, though the day of the month given in it falls on some other day of the week.

So, Mr. Wharton, in his Criminal Pleading and Practice (8th ed.), section 121, says: "The statement of the day of the month, in an indictment for an offence on Sunday, though the doing of the act on that day is the gist of the offence, is not more material than in other cases; and hence, if the indictment charge the offence to have been committed on Sunday, though it names the day of the month which does not fall on Sunday, it is good."

In *People* v. *Ball*, 42 Barb. 324, the offence was charged to have been committed on Sunday, October 13th, 1862. The

date named was Monday. The court said: "It was not an essential element in the offence charged, that it should have been committed on the 13th day of the month mentioned, or on any other day of that month. The time was not material, provided the day when the sale was made, which was the subject of the complaint, was Sunday. The statement of the day of the month, in an indictment for committing an offence on Sunday, though the doing of the act on that day is the gist of the offence, is not more material than in other cases."

So, upon a similar indictment, in *State* v. *Eskridge*, 1 Swan (Tenn.) 413, the court said: "The day of the month is immaterial; the gist of the offence is that the spirituous liquor was sold on Sunday, and whether the day of the month is correctly stated is no more important in this than in other offences."

In *Hoover* v. *State*, 56 Md. 584, it was held that where the offence consists in doing a thing on Sunday, the indictment will be good if it charge the unlawful act to have been done on Sunday, though the day of the month given in it falls on some other day of the week.

To the same effect, also, is *State* v. *Drake*, 64 N. C. 589. The only case that we can find holding to the contrary is *Werner* v. *State*, 51 Ga. 426. The indictment charged that the offence was committed on Sunday, April 4th, 1873, when in fact that date was Friday. It was held that the motion to quash the indictment should have been sustained. The court in that case seems to have overlooked the authorities upon this question, and cites no case that supports its ruling. We can not, in view of the other cases to which we have referred, supported as they are by such eminent text-writers as Bishop and Wharton, regard the Georgia case as authority.

Counsel for the appellant call our attention to *Clark* v. *State*, 34 Ind. 436; *State* v. *Land*, 42 Ind. 311; *Effinger* v. *State*, 47 Ind. 235. In each of these cases the offence was charged to have been committed "on or about" a certain day, which day was alleged to have been Sunday.

The indictment in each case was held bad, because it did not aver, unequivocally, that the offence was committed on Sunday, but "on or about" a certain day, which was Sunday. Those cases do not militate against what we must hold as the law in the present case.

It is true, as claimed by the appellant, that, in the present case, time is of the essence of the offence, but we do not regard the time as so imperfectly stated in the indictment as to require it to be quashed under clause 8 of section 1756, R. S. 1881.

We come to the appellant's motion for a new trial. The prosecuting witness, Hattie Whipple, testified quite positively, in her examination in chief, that she purchased for her husband intoxicating liquor of the defendant on Sunday, May 20th, 1883. Her cross-examination may have thrown some doubt upon her evidence as to the time being Sunday; and she was contradicted by the defendant who testified that he never sold her intoxicating liquor on any Sunday. The evidence was conflicting, but as the court below had the witnesses before it, with an opportunity of observing their appearance and manner of testifying, we can not say that the evidence did not authorize a conviction.

Judgment affirmed, at the appellant's costs.

Filed Nov. 23, 1883.

---

No. 10,666.

## BOYCE *v.* GRAHAM.

| | |
|---|---|
| 91 | 420 |
| 127 | 508 |
| 91 | 420 |
| 131 | 228 |
| 91 | 420 |
| 185 | 675 |
| 91 | 420 |
| 154 | 324 |

BILL OF EXCEPTIONS.—*Practice.*—*Pleading.*—A motion to make a pleading more specific can come into the record only by bill of exceptions or order of court.

SAME.—*Time of Filing.*—A bill of exceptions filed after the term, on time given upon overruling a motion for a new trial, can not embrace matters occurring before the beginning of the trial.

SAME.—*Presumption.*—When a bill of exceptions is filed within the term at which the ruling excepted to was made, it will be presumed to be in accordance with leave given at the time of the ruling.

Boyce v. Graham.

DAMAGES.—*Landlord and Tenant.—Lease.—Complaint.—Parties.—Statute of Frauds.*—A complaint averred that the plaintiff leased a tract of land of W., who had put him in possession; that defendant had a prior lease of part of it which expired March 1st, 1881, and that he thereafter wrongfully and unlawfully kept the plaintiff out of possession, well knowing that he was entitled to the possession, and so used said part as to render it valueless for that year to plaintiff, to his damage.

*Held*, that the facts alleged constituted a cause of action.

*Held*, also, that W. was not a necessary party plaintiff or defendant.

*Held*, also, that the defendant could not invoke the statute of frauds against the plaintiff's lease.

EVIDENCE.—*Title.*—Proof by the plaintiff of his title as alleged is always admissible.

SAME.—When both parties claim title derived from the same person, it is sufficient proof of the plaintiff's title if he trace it from that person to himself.

PLEADING.—*Demurrer.—Measure of Damages.*—If a complaint show the plaintiff entitled to damages, it is good against a demurrer, and the measure of damages can not be settled by the demurrer.

SAME.—*Striking Out.*—The general denial, and a special paragraph embracing only matter admissible under the denial, being pleaded, the special paragraph should be struck out on motion.

From the Delaware Circuit Court.

*J. R. McMahan*, for appellant.

*W. Brotherton* and *R. S. Gregory*, for appellee.

ELLIOTT, J.—A motion to make a complaint more specific is a collateral one and belongs to that class which can only be brought into the record by a bill of exceptions or special order of court. *Jarvis* v. *Banta*, 83 Ind. 528.

Where exceptions are taken to rulings made in forming issues on motions to strike out, to make more specific and the like, exceptions must be entered at the time the rulings are made, and leave must then be taken to reduce the exceptions to writing. There is a marked and important difference between rulings made during the trial, and those made upon the pleadings prior to issue joined. The statute imperatively requires that exceptions to rulings of the character last mentioned shall be reduced to writing at the time they are made, or that leave to afterwards reduce to writing shall be

then obtained. The bill of exceptions filed within the time allowed for the filing of bills upon the overruling of the motion for a new trial does not take up and embrace motions made during the framing of issues in cases where the bill is not filed during the term. When the bill is filed within the term at which the ruling is made, it will be presumed that leave was granted when the ruling was made. *Goodwin* v. *Smith*, 72 Ind. 113 (37 Am. R. 144); *Alcorn* v. *Morgan*, 77 Ind. 184; *Pitzer* v. *Indianapolis, etc., R. W. Co.*, 80 Ind. 569; *Ryman* v. *Crawford*, 86 Ind. 262; *Cardwill* v. *Gilmore*, 86 Ind. 428; *Flory* v. *Wilson*, 83 Ind. 391; *Volger* v. *Sidener*, 86 Ind. 545; *Ulrich* v. *Hervey*, 76 Ind. 107. It would be unreasonable to presume that a leave to file a bill, given upon overruling a motion for a new trial, should extend back to the rulings on the complaint, reaching back in many cases several terms, but it is not unreasonable to presume that the leave was intended to embrace all the rulings on the trial, for that is regarded as an entirety. The proper procedure for a party who desires to avail himself of an exception to a ruling on a collateral motion is to obtain leave to reduce his exception to writing at the time it is taken.

The question upon the motion to make the complaint more specific is not properly reserved.

The complaint alleges that appellee had leased a tract of land of one Volney Wilson, who had put him in possession; that before that time the appellant had leased part of it for the purpose of rotting flax straw upon it; that his right fully expired on the 1st day of March, 1881, and that he thereafter wrongfully and unlawfully kept the appellee out of possession of said part until June 1st, 1881, although he well knew that appellee had leased it and was entitled to possession. It also alleges that appellant, after March 1st, 1884, so used said part as to render it valueless to appellee during the spring, summer and fall of said year, to his damage, etc. The complaint states a cause of action. The right of the appellee to possession became vested on the 1st day of March, 1881, and the appellant

wrongfully invaded this right by excluding him from the possession. There was a clear invasion of a legal right, and in such a case an action will lie.

The appellant has no right to make the point that Wilson's lease to appellee was not in writing. Parties alone can avail themselves of the benefit of the statute of frauds. *Dixon* v. *Duke*, 85 Ind. 434.

The complaint shows that the appellee had a right to the possession, and was in part possession, and this vested in him a cause of action against one who deprived him of that right, and Wilson was not a necessary party defendant. The cause of action for exclusion from possession was in appellee alone. Wilson having leased the land could not have maintained an action for possession, and surely could not have joined with appellee, who had the sole and exclusive right of possession; Wilson might have sued for damage to the inheritance, but not for possession, nor for injury to the mere possessory right.

The measure of damages can not be determined upon a demurrer to a complaint; for, if the complaint shows a right to some damages, although not all claimed, it will overthrow a demurrer. *Bayless* v. *Glenn*, 72 Ind. 5.

The matters stated in the second paragraph of the answer were admissible under the paragraph which pleaded the general denial, and it was properly rejected.

It was proper for the court to permit appellee to prove the contract between Wilson and appellee, as well as between Wilson and the appellant, for this was necessary in order to establish title in the appellee and lack of it in the appellant.

As both parties claimed through a common source, Volney Wilson, the appellee, made a *prima facie* case at least when he showed the respective titles and the source from which they were derived. Where both parties claim through the same person, it is sufficient to prove title in that person without showing how he derived it. *Wilson* v. *Peelle*, 78 Ind. 384.

Judgment affirmed.

Filed Nov. 23, 1883.

No. 11,340.

## SMITH *v.* HESS, SHERIFF.

| | |
|---|---|
| 91 | 424 |
| 124 | 26 |
| 125 | 559 |
| 126 | 510 |
| 91 | 424 |
| 132 | 249 |
| 91 | 424 |
| 134 | 90 |
| 136 | 620 |
| 91 | 424 |
| 139 | 274 |
| 139 | 294 |
| 91 | 424 |
| 163 | 466 |

JUDGMENT.—*Void and Voidable.*—A judgment by a court of competent jurisdiction is not void unless the thing lacking or making it so is apparent in the record. If the infirmity do not so appear the judgment is not void, but may be voidable.

SAME.—*Delay of in Criminal Cases.*—Under section 1767, R. S. 1881, upon a plea of guilty, the court is not bound to pronounce judgment *eo instanti*, but may delay it for the purpose of hearing testimony as to aggravating or palliating circumstances.

SAME.—*Collateral Attack.*—Where an appeal or other direct mode for the correction of errors in a judgment is provided, that mode must be pursued.

SAME.—*Habeas Corpus.*—A judgment by a court of competent jurisdiction, valid on its face, is an unanswerable return to a writ of *habeas corpus* issued for the release of a person imprisoned by virtue of such judgment.

From the Superior Court of Marion County.

*E. A. Parker, S. M. Shepard, J. B. Elam* and *C. Martindale*, for appellant.

*W. T. Brown* and *R. O. Hawkins*, for appellee.

ZOLLARS, J.—This is a habeas corpus proceeding, instituted by appellant against appellee, as the sheriff of Marion county, to release himself from an alleged illegal imprisonment. The record of the criminal court of Marion county, introduced in evidence upon the hearing below, shows that on the 21st day of August, 1883, appellant pleaded guilty to a charge of grand larceny in that court. As a part of the record entry, showing the plea, is the following: "Sentence withheld." Nothing further appears in the records of that court in relation to the case until the 27th day of October, 1883. The entry upon that day shows that appellant was in court, appearing in person and by counsel; that judgment was pronounced upon this plea, and that he was sentenced to three years imprisonment in the State's prison. The sheriff was charged with the execution of the sentence, and by virtue of this judgment and order, held appellant when this proceed-

ing was instituted. It will be observed that the proceedings and judgment of the criminal court are neither irregular nor void upon the face of the record, unless made so by the statement "Sentence withheld." Some confusion has been brought into the cases by the use of the terms *void* and *voidable*, as applied to judgments. Judgments are frequently spoken of as void, because they may be so declared in a proper proceeding. The general and correct rule, as established by the weight of authority, is, that a judgment by a court of competent jurisdiction is not void, unless the thing lacking, or making it so, is apparent upon the face of the record. If the infirmity do not so appear, the judgment is not void, but voidable. One is a nullity, a mere *brutum fulmen*, and may be so treated by all persons, in collateral as well as direct attacks. The other, except in certain cases of fraud, is binding upon third parties, and upon the parties to it, as against a strictly collateral attack. Freeman Judg., section 116; *Allen* v. *Huntington*, 16 Am. Dec. 702; *Gall* v. *Fryberger*, 75 Ind. 98; *Bloomfield R. R. Co.* v. *Burress*, 82 Ind. 83; *Coan* v. *Clow*, 83 Ind. 417; *Cain* v. *Goda*, 84 Ind. 209; *Krug* v. *Davis*, 85 Ind. 309; *Pressler* v. *Turner*, 57 Ind. 56; *Evans* v. *Ashby*, 22 Ind. 15.

In the case before us, the court is one of record and criminal jurisdiction, with full power to hear and determine all criminal charges known to the laws of the State. It had jurisdiction of the subject-matter, and of the person of the defendant, as shown by its record, and so far as shown by that record proceeded in the manner provided by law. The judgment therefore is not void, unless, as we have said, made so by the entry "Sentence withheld," and the delay which followed "Sentence withheld,' means simply that the judgment was delayed. If the court has authority to delay judgment upon a plea of guilty for any time or for any purpose, the judgment in question is not void upon its face. Section 1767, R. S. 1881, is as follows: "If the accused plead guilty, such plea shall be entered on the minutes, and he shall

be sentenced, or he may be placed in the custody of the sheriff until sentence. And if an accused be under the age of twenty-one years, the court may, in its discretion, withhold sentence, and order that the accused be released during good behavior; and the court shall have full power to order his or her re-arrest, and to pronounce sentence whenever the conduct of the accused shall, in the opinion of the court, make such action proper."

This section clearly gives the court the right to delay sentence. This is reasonable, and in many cases absolutely necessary to the administration of justice. In many cases the court may not be sufficiently advised at the time of the plea of guilty to inflict the proper punishment. It may be necessary to hear evidence to inform the court of the circumstances under which the crime may have been committed, whether palliating or aggravating. That evidence may not be at hand, and a delay of sentence may be necessary to obtain it. The record of the criminal court, *supra*, does not show for what reason the sentence was delayed. The court having the power to delay it, the presumption should be indulged that it was delayed for proper and legal reasons, and for a proper and reasonable time. The judgment then is not void upon its face, but regular and valid, and appellant was, and is, in custody upon a process issued upon a final judgment of a court of competent jurisdiction. It must be remembered that this is not an appeal from that judgment, but a collateral attack upon it. Under the writ of habeas corpus appellant seeks to overthrow it, and have his imprisonment under it declared illegal.

To accomplish this, he claims the right to show *dehors* the record of the criminal court, that, at the time the sentence was withheld, he was 26 years old, and was allowed to depart from the "presence and custody of the court" without bond or recognizance; that the judge of the court told him that if he was brought back, or ever came into the court again, he would be sentenced; that he was absent from the court, and a part

of the time from the State, until the 27th day of October, 1883, when he was arrested upon the streets of Indianapolis by a policeman, without any new warrant, or new legal proceeding, and was taken before the judge of the criminal court and sentenced, and remanded to the custody of the sheriff, as shown by the record of the criminal court. Over the objection and exception of appellee, he was allowed to state these facts in evidence. Upon the admission of this testimony appellee assigns cross errors.

The contention of appellant now is, that, under the statute above set out, the criminal court has authority to allow minors to go on good behavior, but not adults; that, by reason of the facts stated, the court lost jurisdiction of the subject and the person, and hence had no authority to pronounce the judgment and sentence; that being thus allowed to depart, operated as an acquittal, and that his re-arrest and sentence was a second jeopardy for the same offence.

The legitimate inference from the statute is that the Legislature, in its enactment, did not intend that the courts should allow adult offenders to go on good behavior. Without deciding what might be the result of such a practice, upon a proper case made, and properly brought before us, we may say that, as at present advised, we do not feel like giving our sanction to that practice. We say this much, really, outside of the case before us. What we decide is, that the judgment of the criminal court, under which appellant is imprisoned, can not be overthrown in the collateral attack here made upon it. For all irregularities and errors that may intervene in the trial and progress of a criminal cause, the statute of this State provides a direct, easy, cheap and speedy remedy by appeal. The doctrine of the cases is, that where such remedy is provided, defendants imprisoned under judgments, and seeking to overthrow them for reasons which do not render them absolutely void, and which are not apparent upon the record, will be driven to seek a remedy by appeal, or other direct proceeding. A judgment by a court of competent jurisdiction,

valid upon its face, and a valid commitment under it, is an unanswerable return to a writ of *habeas corpus*. A large number of the States have statutes providing that a prisoner shall not be discharged under a writ of *habeas corpus*, where it appears that he is held in custody by virtue of the judgment or decree of a court of competent jurisdiction, or by virtue of a warrant issued upon such judgment or decree. This State is one of them. The writ of *habeas corpus* is not to take the place of a writ of error or a court of appeals.

Section 1119, R. S. 1881, provides that, under this writ, no court or judge shall enquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in the cases following, among others:

"*Second.* Upon any process issued on any final judgment of a court of competent jurisdiction."

"*Fourth.* Upon a warrant issued from the circuit court upon an indictment or information."

In the case of *Wright* v. *State*, 5 Ind. 290, Wright applied to the judge of the common pleas court of Elkhart county for a writ of *habeas corpus*. The writ was granted. After return, and upon the hearing, it was made to appear that Wright had been indicted for murder by the grand jury of that county. Upon a plea of not guilty he was put on trial before a jury in the the circuit court. Over his objection the jury was improperly discharged, and he was remanded to jail to await a trial before another jury. Upon these facts the judge of the common pleas refused to release him, and remanded him to jail for trial in the circuit court. He appealed. Upon that appeal this court held that he had been in jeopardy, and that the discharge of the jury was, equivalent to a verdict of acquittal, but that under the statute the court below was not in error in refusing a discharge, and in remanding him for trial; that his remedy was to procure a discharge by an order of the circuit court, or to plead the discharge of the jury in bar of a second trial. Under similar facts the doctrine of this case is ap-

proved, and re-asserted in the cases of *Wright* v. *State*, 7 Ind. 324, and *Wentworth* v. *Alexander*, 66 Ind. 39. We are supported in our conclusion by the text-writers, and the adjudicated cases. Hurd Habeas Corpus, 326 *et seq.*; Cooley Const. Lim., 348; *State* v. *Sheriff*, 24 Minn. 87; *Ex Parte Maxwell*, 11 Nev. 428; *Ex Parte Murray*, 43 Cal. 455; *Petition of Crandall*, 34 Wis. 177; *Ex Parte Ruthven*, 17 Mo. 541; *Bell* v. *State*, 4 Gill (Md.) 301; *Ex Parte Bond*, 9 S. C. 80 (30 Am. R. 20); *Fleming* v. *Clark*, 12 Allen, 191; *Ex Parte Shaw*, 7 Ohio St. 81; *Perry* v. *State*, 41 Tex. 488; *Commonwealth, ex rel.*, v. *Lecky*, 1 Watts (Pa.) 66; *Ex Parte Twohig*, 13 Nev. 302; *Ex Parte Kaufman*, 73 Mo. 588; *Ex Parte Farnham*, 3 Col. 545; *Ex Parte McCullough*, 35 Cal. 97; *In Re Coffeen*, 38 Mich. 311; *State* v. *Shattuck*, 45 N. H. 205; *Ex Parte Parks*, 93 U. S. 18; *Ex Parte Watkins*, 3 Peters, 193.

It might be interesting and profitable to quote from some of the numerous cases above cited, would it not extend this opinion to an undue length.

Our conclusion upon the case in hearing is that the court below erred in the admission of appellant's oral testimony, but not in its judgment. The judgment of that court, therefore, in refusing to discharge appellant, and in remanding him to the custody of the sheriff, is affirmed with costs.

Filed Feb. 1, 1884.

---

91 429
135 355

No. 10,176.

## Walls et al. *v.* Baird.

Promissory Note.—*Mortgage.—Joint Obligors.—Release of One.—Payment.*—W. and L. were joint makers of a note secured by a mortgage on lands executed by W. and wife, which contained a covenant by the mortgagors to pay "the sum of money" mentioned in the note. L., on payment of a small part of the note, was entirely released.

*Held*, that W. and wife were not thereby released from their covenant to pay, contained in the mortgage.

From the Boone Circuit Court.

*W. B. Walls* and *W. H. Thompson*, for appellants.

*C. S. Wesner*, *T. A. Hendricks*, *A. W. Hendricks*, *C. Baker*, *O. B. Hord*, *A. Baker* and *E. Daniels*, for appellee.

FRANKLIN, C.—Appellee sued appellants on a promissory note and for the foreclosure of a mortgage. The note was executed by Walls and Lane, and the mortgage was executed by Walls and wife upon real estate held by them jointly by entireties. The defence was payment and a release of Lane from all liability on the note, and claiming such release as an exemption from all liability of the other defendants upon either the note or mortgage. The pleadings are extensive, but all the issues culminate in and are based upon the above named questions. The defendants withdrew their general denials, admitted the cause of action, confessed the claim for attorney fees, and assumed the burden of proof upon their affirmative issues. The cause was submitted to a jury for trial, the evidence heard, and plaintiff demurred to the evidence, which was sustained by the court, and a final judgment and decree rendered for the plaintiff. There was no personal judgment rendered against either of the defendants. There was a finding for the plaintiff for the amount due, and over a motion for a new trial a decree of foreclosure was rendered for its payment.

The assignments of error contain various specifications, but that mostly relied upon by appellants is upon the sustaining of the demurrer to the evidence. If Lane was released from the note, and his release released Walls also from the note, and Walls and wife from the mortgage, then the demurrer was not correctly sustained.

There was very little if any conflict in the evidence. The facts proved are substantially as follows: Walls and Lane had been partners in the mercantile business in the city of Lebanon, Indiana. They borrowed money of Baird for which the note in suit was given and it was used in their said partnership business. In August, 1877, they settled up their

partnership, except the payment of appellee's note and mortgage, then amounting to $1,781.38. Lane then held an older note and mortgage on Walls and wife; and Lane became desirous that appellee's note should be settled, or that he should be released from liability upon it. Lane was the father-in-law of both Walls and Baird.

Upon the condition of the accounts between Walls and Lane, they agreed that if Baird would consent, Lane would pay Baird $381.38 and surrender to Walls his note and mortgage then amounting to $766.75, and Walls should execute a new note on time to Baird for $1,400, and take up and cancel the old partnership note and the mortgage herein sued on. Lane presented said agreement to Baird in a written statement containing the part that each was to pay. Baird declined to accept the proposition, but agreed with Lane that if he would pay the $381.38 and surrender to Walls the said older note and mortgage, and enter the record thereof satisfied, he would release Lane from all liability on the note. Lane paid the $381.38; and there was endorsed upon the written statement of what each would pay, the following:

"I have credited Lane with the $381.38, this date.

(Signed). "J. W. BAIRD."

The statement is signed by W. B. Walls.

Lane then surrendered the older note and mortgage to Walls and satisfied the record thereof.

The note sued on was for $1,868.50, dated August 19th, 1873, and contained the endorsement of several credits, among which are the following: "Received in settlement with T. C. Lane, $381.38, August 3d, 1877. I hereby release the said Lane of any further obligation as security to said note."

The mortgage bore the same date of the note and contained the provision that "the mortgagors expressly agree to pay the sum of money above mentioned without relief from valuation laws," and was duly executed, acknowledged and recorded. The mortgage record contained on the margin several endorsements of credits, among which are the following:

"AUGUST, 3d, 1877.

"Received on within note $381.38, endorsed on note. I hereby release the said Lane of any further obligation of security to said note. (Signed) J. W. BAIRD."

The written statement above referred to reads as follows:

"LEBANON, INDIANA, August 4th, 1877.

"Statement as to the amount due from Lane and Walls on their note due George W. Baird, $1,781.38, Lane and Walls having made a full settlement of all accounts between them, including a note and mortgage held by Lane against Walls. All accounts and debts of Lane and Walls being paid with the exception of the amount due Baird. Walls is to pay on the note due from Lane and Walls $1,400. Lane is to pay Baird on the note due from Lane and Walls $381.38.

"WILLIAM B. WALLS."

Lane testified that the agreement was that he should be released. Baird testified that he intended to release Lane, and thought he was released. Lane immediately returned the statement of how much each was to pay to Walls, with his credit endorsed thereon, surrendered the note and mortgage on Walls to him, and entered satisfaction of the record of the mortgage. Baird at the time refused to surrender the note and mortgage sued on, for the reasons that Walls was good for them, and he did not want to change them.

Upon these facts being proved, appellants Walls and wife insist that Lane was released; and that by his release Walls was released from the note, and Walls and wife from the mortgage. All of which are controverted by appellee.

Joint and several assignments of error have been filed, and a number of specifications are made under each, but they are all dependent upon the foregoing propositions in relation to the release, and it is unnecessary to set them forth, or discuss each in detail.

Appellee insists that Lane was not released; that there was no consideration for the release; that the $381.38 paid by

Lane was only a partial payment of a debt for which he was liable to pay the whole. In this we think appellee is mistaken. Lane surrendered a note and mortgage to Walls for $766.75, in addition to the payment, and in part consideration of his release upon this note. We think there was a sufficient consideration for the release, and that Lane was released.

Appellee further claims that if Lane was released, that did not release Walls from liability on the note; that Lane's release was with the knowledge and consent of Walls, and under a declaration of the payee of the note, that Walls should remain liable upon it.

There was evidence tending to show that Walls at the time knew nothing of Lane's release, and never afterwards consented thereto, from which the jury might have drawn the inference that such were the facts; and as to Wall's release on the note, the demurrer to the evidence could not have been sustained. *Indianapolis, etc., R. R. Co.* v. *McLin*, 82 Ind. 435.

The court below must have taken this view of the case, because it gave no personal judgment against Lane or Walls upon the note, and that is equivalent to finding for them as to this question.

The law is well settled that the unconditional release of one or more of joint obligors releases all the joint obligors. *Aylesworth* v. *Brown*, 31 Ind. 270. But we do not see that these questions are well presented; appellee has assigned no cross errors; appellant Lane has declined to unite in the appeal, and we do not see that Walls has any right to complain, no personal judgment having been rendered against him on the note.

The remaining question is, did the release of Lane, and the assumed consequent release of Walls, from liability on the note, also release Walls and wife from liability on the mortgage?

Any payment or satisfaction of the debt would doubtless

discharge any liability on the mortgage. But the question here is, will the release of one joint obligor on a note release the other obligor on a mortgage given to secure its payment, the mortgage containing an independent stipulation to pay, and the released obligor not being a party to it. Upon this question appellants have referred us to the following cases: *Armstrong* v. *Murphy*, 2 Ind. 601; *Sherman* v. *Sherman*, 3 Ind. 337; *Bowman* v. *Mitchell*, 79 Ind. 84.

The first case cited is not applicable; there was a satisfaction of the debt in that case. Neither do we think the second case is in point; there the note was surrendered to the maker with the intention of cancelling it. Here there was no surrender of the note, but a retainer of it, with an intention to hold Walls liable to pay the balance. In the last case cited a mortgage was given to secure the payment of a note. The note was materially altered, and the following language was used by this court: "A mortgage given to secure a void note can not be enforced. Whatever discharges a note discharges a mortgage which secures it." And *Sherman* v. *Sherman*, *supra*, is cited as authority. The authority cited, perhaps, does not fully justify the broad language used, and it may need some little qualification or limitation.

In 2 Jones on Mortgages, section 983, we find the following language: "The personal liability of the mortgagor may be released without extinguishing the mortgage, if this be done without any intention of discharging the debt." *Donnelly* v. *Simonton*, 13 Minn. 301; *Hayden* v. *Smith*, 12 Met. (Mass.) 511. "Whether the intention in any case was to discharge the debt or merely the personal liability is a question of fact, depending upon the circumstances of the case or the construction of the release." *Tripp* v. *Vincent*, 3 Barb. Ch. (N. Y.) 613. "If the mortgage note be left outstanding, and there is no evidence that the release was intended to operate as payment of the note, the mortgagee may still collect or negotiate the note." *VanDeusen* v. *Frink*, 15 Pick. 449.

In the case at bar, it was clearly the intention of the mortgagee not to release Walls from the payment of the debt. The language of the release as endorsed upon the note, the statement of accounts, and margin of the mortgage record, all show distinctly that it was intended to operate only to release Lane from liability on the note, and leave at least the mortgage in full force against Walls and wife. And as in this case, where the mortgage contains an independent express promise to pay the debt, that intention ought to be carried out and Walls and wife held liable on the mortgage to the extent of the sale of the mortgaged premises, if the ballance of the debt be not paid by Walls. There is no evidence tending to show, or from which the jury could reasonably infer, that Walls and wife were intended to be released from the mortgage. There is no error in sustaining the demurrer to the evidence, as to the foreclosure of the mortgage. *Ruff* v. *Ruff*, 85 Ind. 431.

The rulings of the court upon the pleadings, the sustaining of the demurrer to a paragraph in the answer, and the overruling of the demurrer to a paragraph in the reply, are each controlled and disposed of by the foregoing ruling upon the demurrer to the evidence. As to the rulings upon the cross complaints, of Walls against Lane, and Mrs. Walls against Lane and Walls, appellee was not a party to them nor affected by them. Lane declined to join in the appeal, and the parties to these questions are not all before the court. Hence they can not be considered.

Appellants Walls and wife insist that the court erred in overruling the motion for a new trial, for the reason that the damages assessed are excessive. And they complain of including in the damages the amount of the $766.75 note and mortgage surrendered to Walls by Lane, and claim that they ought to be credited with that amount, of the date of surrender. Conceding, but not deciding, that this question may be presented by a motion for a new trial, we can not see

any reason for this claim. Appellee received no part of that amount, and it was not intended to be credited on the note and mortgage sued upon. Appellant Walls received it, and it was intended that he should pay the balance of the debt sued on including that amount, and this was to assist him in doing so. It would be strange for him to be credited with that which he received and ought to have paid to appellee, but had never done so. After said arrangement, Walls made some payments on the note sued upon, but he or appellee never called upon Lane for any further payments.

There was no error in overruling the motion for a new trial.

We think the case was decided correctly upon its merits, and find no available error in the record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Sept. 26, 1883.

## ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellants, in their petition and brief for a rehearing, insist that this court, in the former opinion, held that Walls was released from the note by Lane's release, and that the finding, including attorney fees, was excessive, the mortgage not providing for attorney fees; and that a new trial ought to have been granted; that the judgment ought to be reversed for refusing to grant a new trial for that reason.

Appellants are mistaken about the court holding that Walls was released from the note by Lane's release. The opinion expressly says that "We do not see that these questions are well presented. Appellee has assigned no cross errors; appellant Lane has declined to unite in the appeal, and we do not see that Walls has any right to complain, no personal judgment having been rendered against him on the

note." The question as to Walls' release on the note is not presented or decided.

Appellants further insist that Lane was a party to the appeal, and that errors were assigned upon the cross complaints against Lane; that he was notified, and was properly in court; and that these specifications of error ought to be decided. True, Lane is made a party to the appeal; and in each of the assignments of error his name appears as one of the appellants. It nowhere appears as an appellee. He declined to join in the appeal, and that certainly took him out of this court. As an appellant he had the right to go out, and his co-appellants had no power to hold him in against his wish.

There is no error in the former opinion in respect to the matters complained of. The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled at appellant's costs.

Filed Nov. 24, 1883.

91 437
127 197

No. 10,756.

## KACKLEY ET AL. *v.* STATE, EX REL. HEITZ.

MORTGAGE.—*Sale of Goods on Execution.—Sheriff's Liability on Bond.—Damages.*—When personal property is encumbered by a mortgage, and is sold by the sheriff on an execution upon a subsequent lien, and possession is delivered to the purchaser without requiring him to comply with the conditions of the mortgage, the sheriff and his sureties are liable for the damages the mortgagee thereby sustains.

SAME.—*Possession of Goods.—Accounting for Sales.*—In such case, if the mortgage by its terms permits the mortgagor to retain possession and sell the goods upon the condition that the sum of the sales, less current expenses, is to be applied upon the mortgage, the amount of such sales can not be augmented by adding thereto the amount of the sale of goods subsequently purchased.

SAME.—*Consideration.—Evidence.*—Where, in an action upon the sheriff's bond in such case, the defendants insist that such mortgage was executed without consideration, the plaintiff may show that the mortgage was given

him to secure him in part as the mortgagor's surety, and in part for money loaned, and may read in evidence notes made by him in discharge of such obligation, though not paid by him till after the commencement of the suit.

SAME.—*Complaint.*—In an action on the sheriff's bond in such case, it is not necessary to aver in the complaint that such mortgage was made in part to indemnify him as surety.

From the Knox Circuit Court.

*W. H. DeWolf* and *S. N. Chambers*, for appellants.

*H. S. Cauthorn*, *J. M. Boyle*; *F. W. Viehe* and *R. G. Evans*, for appellee.

BEST, C.—The State, on relation of Anthony Heitz, brought this action against James E. Kackley and his sureties upon his official bond as sheriff, to recover such damages as the relator had sustained by reason of the alleged fact that such sheriff, upon an execution against William A. Wendling, had sold and delivered certain personal property of said Wendling upon which the relator had a prior lien by mortgage, without requiring the purchaser to comply with the conditions of such mortgage.

Issues were formed, a trial had, and a verdict returned for $725, upon which, over a motion for a new trial, judgment was rendered. This ruling is assigned as error.

Under the assignment that the verdict was contrary to the evidence, the appellants insist that nothing was due upon the appellee's mortgage. The mortgage was upon a stock of drugs, counters, shelving, soda fountain, etc., the possession of which the mortgagor retained, and by the terms of the mortgage all sales in excess of current expenses were to be applied in payment of the mortgage. The property was not sold for more than a year after the mortgage was executed, and the appellants insist that enough of the goods were sold within this time to extinguish the mortgage. This was a question of fact that was, for aught that appears, properly submitted to the jury; and an examination of the evidence leads us to the conclusion that the fact was properly found. The mortgage

was for $2,500, and the property embraced in it was shortly before purchased in trade for $3,000, and was not worth more than that sum. The evidence tended to show that the greater part of this property remained unsold when the sheriff made his sale. The mortgagor, however, testified that his daily sales of drugs, medicines, and cigars averaged $15, and that the money realized therefrom was used in replenishing the stock. As the mortgagor had possession of the property about 13 months after the execution of the mortgage, the appellants insist that he must have sold more than $4,000 of such property, and as current expenses were only about $900, the excess was sufficient to extinguish the mortgage. A mere statement of these facts furnishes a complete answer to this position. They show that the stock was not reduced enough by sales to extinguish the mortgage, and the several amounts of the successive sales of goods purchased, with the proceeds of the mortgaged property, can not be added for the purpose of augmenting the amount of the mortgaged property sold. A sale of $500 of the mortgaged goods invested in other goods sold for a like sum does not reduce the stock $1,000, and that sum should not be applied upon the mortgage. Without resorting to this mode of counting sales, the mortgage was not extinguished, and, as this can not be done, it follows that the fact was correctly found.

It is next insisted that the court erred in allowing the appellee to offer evidence that the mortgage was given to secure him in part against his liability as the mortgagor's surety, and especially in allowing him to read in evidence certain notes, paid after the commencement of the suit, which were given by the appellee for money furnished to the mortgagor.

The appellants maintain that no such proof was admissible without an averment in the complaint that the mortgage was given as an indemnifying mortgage. In this we think they are mistaken. They alleged in their answer that the mortgage was executed without consideration, and for the purpose

of defrauding the mortgagor's creditors. They also offered some evidence upon these pleas. For the purpose of meeting these the appellee offered evidence to show that the mortgage was made to secure in part money before that time loaned, and in part to secure him as surety. He also offered evidence to show that he was compelled to pay the several sums for which he was bound as surety, and that in doing so he made his own notes, some of which were not paid till after the suit was commenced. All this was legitimate for the purpose of showing that the mortgage was supported by a sufficient consideration. The fact that some of these notes were not not paid till after the suit was commenced was wholly immaterial if the mortgage was in fact made to secure the undertaking, whereby he obligated himself to pay the money for which the notes were executed; nor was it necessary to aver in the complaint that the mortgage was made in part to secure him as surety. The note imported, upon its face, a valuable consideration, and no reason exists for an averment upon the subject. The want of consideration must be averred by the other side. A mortgage absolute in form will secure a mortgagee against his liability as surety. Jones Chat. Mort., section 82. Besides, this mortgage was given in part for money loaned, and can not be said to be purely an indemnifying mortgage. No error was, therefore, committed in these respects.

No other point is raised, and as no error appears in the record the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellants' costs.

Filed Nov. 24, 1883.

No. 10,392.

91 441
152 217
91 441
155 149

## MUNCIE NATIONAL BANK *v.* MILLER.

CONSTITUTIONAL LAW.—*Legalizing or Curative Statutes.—Validating Unauthorized Judgments.—Act of March 2d, 1877.*—The General Assembly might provide by law before the rendition of judgment, that the written waiver by the defendant of the issue and service of a summons, and his written appearance in or to an action, endorsed on the complaint therein, should be equivalent to the issue and service of a summons on him in such action. This being so, the General Assembly may also provide by law, after the rendition of the judgment, that any judgment rendered in good faith, upon the written waiver by the defendant of the issue and service of a summons on him in the action, "shall be deemed legal and valid in all respects, the same as if a summons had been duly issued and served." Therefore the act of March 2d, 1877, "legalizing certain judgments rendered without the formal service of process, and sales thereon," etc., (Acts 1877, Reg. Sess., p. 93), is not repugnant to any provision of the Constitution, and is a valid law.

From the Delaware Circuit Court.

*C. W. Moore, R. S. Gregory* and —— *Silverburg*, for appellant.

*W. Brotherton* and *W. W. Orr*, for appellee.

HOWK, J.—On the 28th day of January, 1876, the appellant, the Muncie National Bank, as plaintiff, filed its complaint on a promissory note, in the court below, against James L. Simmons, Jacob H. Wierman, Andrew Wilson, William Goings, Francis Sipe and the appellee, Luther F. Miller, as defendants. On the same day, the clerk of the court issued a summons on such complaint, directed to the sheriff of Delaware county, and commanding him to summon each and all of the above named defendants to appear before said court on the second day of the next term thereof, to be held at the court-house in the city of Muncie on the first Monday of February, 1876, and answer such complaint. This summons was personally served, on the day of its date, on each and all of said defendants except the appellee, Luther F. Miller, and, as to him, the sheriff's return was silent. On the complaint, and

of the date of its filing, the appellee Luther F. Miller executed a written waiver of the issue and service of a summons on him, in said cause, and entered his appearance thereto in the words and figures following, to wit:

"January 28th, 1876. I hereby waive the issuing and service of summons upon me, in the within entitled cause, and appear thereto, and consent to the same proceeding to final trial and judgment at the February term of the Delaware Circuit Court, 1876. (Signed) LUTHER F. MILLER."

Such proceedings were had in said cause, as that, at the February term, 1876, of the court below, to wit, on the 26th day of February, 1876, judgment was then and there, and therein, rendered in favor of the Muncie National Bank, and against each and all of the above named defendants, Luther F. Miller included, for the sum of $1,026.26, and the costs of suit.

More than five years afterwards, to wit, on the 17th day of May, 1881, the appellee, Luther F. Miller, commenced this suit against the appellant to obtain a decree of the court declaring void the aforesaid judgment against him, and enjoining the collection thereof. His complaint was in two paragraphs, to each of which the appellant's demurrer for the want of facts was overruled by the court, and its exception saved to this ruling. The appellant answered specially in a single affirmative paragraph, to which the appellee demurred upon the ground that it did not state facts sufficient to constitute a defence to his action. This demurrer was sustained by the court, and to this ruling the appellant excepted and declined to amend or answer further. The court thereupon rendered judgment for the appellee, in accordance with the prayer of his complaint, declaring the aforesaid judgment as against the appellee Luther F. Miller void and of no effect, and perpetually enjoining the appellant from enforcing the collection of such judgment, by execution against the appellee, or his property.

Errors are assigned by the appellant in this court, which present for decision the following questions, namely:

1. Does the judgment recovered by the Muncie National Bank against Luther F. Miller, in the court below, on the 26th day of February, 1876, come within the scope of the decision of this court in *McCormack* v. *First National Bank of Greensburgh*, 53 Ind. 466, and is it therefore null and void?

2. If it be conceded that the judgment referred to falls within the doctrine of the case cited and is avoided thereby, can the appellee Luther F. Miller maintain this action to be relieved from such judgment and to enjoin its collection in view of and notwithstanding the curative statute of March 2d, 1877, entitled "An act legalizing certain judgments rendered without the formal service of process, and sales thereon, and declaring an emergency?" Acts 1877, Reg. Sess., p. 93.

We deem it unnecessary for us to consider or decide the first of these two questions, although there are marked differences between the case cited and the case at bar. The former was a suit brought by the judgment defendants, within the time allowed by law, to obtain a review of the judgment for error of law appearing in the proceedings and judgment; while, in the case now before us, the appellee brought his action against the appellant long after the expiration of the time allowed by law for obtaining a review of the former judgment, not to obtain such review, but to have the judgment against him annulled and declared void, and to enjoin its collection. It may well be doubted, therefore, as it seems to us, whether or not the doctrine of the case cited can be made applicable to the judgment of which the appellee complains in the case in hand.

Passing this point, however, we come to the consideration of the second question above stated. The preamble and first section of the above entitled act of March 2d, 1877, were as follows:

"Whereas, It has been represented to this General Assembly that some of the courts of this State have rendered judgments and decrees in cases where the service of process

was attempted to be waived by written agreement, not endorsed on the summons, and without the formal service of summons; and it being also represented that numerous sales of property, real and personal, have been made in good faith under and by virtue of such judgments and decrees, and the titles arising from such sales are defective, on account of the decision of the Supreme Court in the case of *McCormack* v. *First National Bank of Greensburgh, Indiana*, therefore,

"Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That all sales, so made by sheriffs, on such defective judgments, in good faith, are hereby confirmed and legalized; and all conveyances made pursuant to such sales are hereby legalized; and all judgments, so rendered in good faith, shall be deemed legal and valid in all respects, the same as if a summons had been duly issued and served: *Provided*, That nothing in this act shall prevent any judgment defendant, his heirs or legal representatives from prosecuting any proceeding heretofore instituted, or from instituting, within six months after the taking effect of this act, any proceeding to set aside such judgment or sale, when he has a meritorious defence to the action, or some part thereof."

In section 2 of this act it was declared that an emergency existed for the immediate taking effect thereof, and that therefore it should be in force from and after its passage.

If this act is a constitutional and valid law, it is very clear, we think, that the appellee could not maintain this action, at the time of its commencement, against the appellant; nor could he then be relieved from the judgment which the appellant had recovered against him in the court below on the 26th day of February, 1876, nor enjoin the collection of such judgment upon or by reason of the matters alleged in either paragraph of his complaint. From briefs of counsel of the parties on both sides, we learn that the rulings of the circuit court were all based upon the theory that the provisions of the curative statute of March 2d, 1877, above quoted, in so

far as they were applicable to the case in hand, were unconstitutional and void. We are of opinion that none of the provisions of this curative or legalizing statute are repugnant to, or in conflict with, the fundamental law, State or Federal, and that the entire statute is a constitutional and valid enactment. In Cooley's Constitutional Limitations, p. 371, the learned author says:

"The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by a prior statute, then it is not beyond the power of the Legislature to dispense with it by a subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

The manner in which a civil action shall be commenced, and of notifying the defendant of the pendency of such action so as to give the court jurisdiction of his person, is a subject within the power and control of the Legislature, and a proper subject of legislative action. It was competent for the General Assembly to have provided by law, before the rendition of the judgment complained of by the appellee, that a written waiver by the defendant of the issue and service of a summons, and of his appearance in or to the action, endorsed on the complaint, should be equivalent to the issue and service of a summons on the defendant in the action. This being so, it was equally competent for the Legislature to provide by law, after the rendition of the judgment, that any judgment rendered in good faith upon such written waiver by the defendant of the issue and service of a summons on him in the action, "shall be deemed legal and valid in all respects, the same as if a summons had been duly issued and

served." This is precisely what was done by the General Assembly of this State, in the enactment of the curative statute above quoted; and it can not be said, we think, that such legislation is unconstitutional and void.

This court has repeatedly held that such legalizing and curative statutes, as the one under consideration, were not repugnant to any provision of the constitution, and were valid laws. Thus, in *Walpole* v. *Elliott*, 18 Ind. 258, it was held to be competent for the Legislature, when not restrained by constitutional provisions, to enact curative laws whereby a void thing may be made valid; and that, by such a law, the Legislature may validate judgments and proceedings which were rendered and had without authority of law. The court said: "Curative statutes are but a species of retrospective legislation; and retrospective legislation is valid where not forbidden by the constitution." To the same effect substantially, are the following more recent decisions of this court: *Price* v. *Huey*, 22 Ind. 18; *Millikin* v. *Town of Bloomington*, 49 Ind. 62; *Halstead* v. *Board, etc.*, 56 Ind 363; *Sithin* v. *Board, etc.*, 66 Ind. 109; *Gardner* v. *Haney*, 86 Ind. 17.

Our conclusion is that the facts alleged by appellee, in each paragraph of his complaint, were not sufficient to constitute a cause of action in his favor and against the appellant; and that, for this cause, the demurrers thereto ought to have been sustained. We need not, therefore, consider the other errors complained of by the appellant.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrers to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

Filed June 20, 1883. Petition for a rehearing overruled Nov. 24, 1883.

No. 10,883.

## FORDYCE *v.* NELSON.

91 447
125 379
91 447
139 322
91 447
145 504
91 447
154 185
91 447
d164 684

PROMISSORY NOTE.—*Assignor and Assignee.*—*Assignment.*—The assignment by one of two holders of a note of his half to the other is a good assignment in equity.

SAME.—*Pleading.*—*Endorsement.*—A complaint by an assignee against the maker of a promissory note need not exhibit a copy of the endorsement.

SAME.—*Lex Loci Contractus.*—*Place of Payment.*—A note payable in another State, but made in this State, is presumed to be made with reference to the laws of that State, and its effect will depend on such laws.

From the Daviess Circuit Court.

*J. H. Stotsenburg* and *C. S. Dobbins*, for appellant.

*W. R. Gardiner* and *S. H. Taylor*, for appellee.

BICKNELL, C. C.—The appellee, as the endorsee and assignee of two promissory notes made by the appellant, brought this suit against him.

The complaint was in two paragraphs, each of which averred the execution of a note by the defendant, its endorsement before maturity by the payee to the firm of Nelson & Noel, and the assignment by Noel of all his interest to his partner, the plaintiff, before the maturity of the paper.

Copies of the notes were made a part of the complaint; they were alleged to be due and unpaid, and each paragraph set forth certain statutes of Missouri, in which State the notes were alleged to have been executed and were payable, and each paragraph averred protest and notice, and claimed that under said statutes the plaintiff was entitled to recover not only principal and interest, but also four per cent. as damages.

Noel was made a co-defendant to answer as to his interest, and he answered admitting the complaint to be true.

The defendant Fordyce answered in four paragraphs, of which the first and third only are material here. The first was the general denial; the third was a special plea of failure of consideration. The plaintiff replied in denial of the third.

The issues were tried by the court without a jury, and the

finding was for the plaintiff—$2,103.85; this was about 60 cents less than the principal and interest due upon the notes at the time of the trial; there was nothing found for the plaintiff as to the four per cent. damages claimed under the Missouri statutes.

Judgment was rendered against the defendant for the amount of the finding. The defendant's motion for a new trial was overruled. The defendant appealed. He assigns as errors:

1. That the complaint does not state facts sufficient.

2. That the court overruled the motion for a new trial.

The reasons alleged for a new trial are, that the finding is contrary to law, and is not sustained by sufficient evidence.

The complaint contains a good cause of action as to the principal and interest due on the notes. Where a note is owned by two, an assignment by one of them of his half of the note is a good assignment in equity. *Groves* v. *Ruby*, 24 Ind. 418. In an action by the endorsee against the maker, it is not necessary to set out a copy of the endorsement. *Treadway* v. *Cobb*, 18 Ind. 36; *Kline* v. *Spahr*, 56 Ind. 296; *Keith* v. *Champer*, 69 Ind. 477.

The first assignment of error can not be supported, and we think the finding was sustained by the evidence, and was not contrary to law.

The third defence was as follows:

That Ewing & Allen, the payees of the notes, proposed to procure the organization of a company or corporation with a paid-up capital of $100,000, to take a lease of defendant's furnace and lands in Martin county, Indiana, for two years, at a yearly rent of $8,000, and that the members of said company or corporation should be well acquainted with the business of carrying on iron works, and should be wealthy and responsible men and would pay all the debts and liabilities of said business, including said rent to defendant; that defendant, relying on said representations, executed said notes, and that said representations were the sole and only consideration of said notes; that said Ewing & Allen did procure the

organization of a company or corporation, known as the Nelson Iron and Coal Company, and procured said company to take such a lease from the defendant, and defendant performed all his part of said contract, and executed such lease to said company, who accepted the same and began operations under it; that all of the said representations of said Ewing & Allen were false and fraudulent, and were by them known so to be at the time they were made, and were made for the purpose of cheating and defrauding the defendant; that said company had not a capital of $100,000, but had only $20,000, not enough to carry on the business, and were not responsible, and did not pay said rent, and in consequence of their ignorance of the business and want of capital they carried on the furnace only about five months, and then abandoned it and forfeited the lease, leaving the rent entirely unpaid; that the plaintiff, when he took the assignments of said notes, well knew that they were obtained by said fraud and false representations, as also did the payees and endorsers of said notes, and that said notes were not transferred, in writing thereon, to the plaintiff when this suit was commenced. Wherefore the consideration of said notes has wholly failed.

The appellant claims that there is no proof of any assignment by Noel to the appellee, but the notes having been endorsed to Nelson & Noel, their endorsement thereof to the plaintiff was substantially an equitable assignment to him of Noel's interest. *Groves* v. *Ruby, supra.*

The appellant also claims that the proof is deficient, because Noel testified that he bought the notes for Nelson & Noel from George W. Cummings, but it does not appear that Cummings ever owned the notes, or had any interest in them. In the absence of anything tending to show title in Cummings, the statement that the notes were purchased from him means that he was the agent or broker through whom the purchase was effected. There is nothing in the testimony contradicting the legal effect of the endorsements upon the notes.

There is no error assigned as to the admission of testimony, and the evidence shows that the plaintiff is a *bona fide* holder of the notes for value, having purchased the same before their maturity, to wit, on the 4th of January, 1881. None of the allegations of the defendant's third defence, which charged that the plaintiff, when he bought the notes, had notice that the same were without consideration, and had been obtained by fraud and false representations, were sustained by the proof. The defendant's testimony showed that the notes were obtained from him under circumstances which would be a good defence for the maker, if the notes were not commercial paper, but are no defence against commercial paper taken for value, before maturity, by a *bona fide* holder, without notice.

Section 5506, R. S. 1881, provides that when a note is payable to order or bearer, in a bank in this State, it is negotiable as an inland bill of exchange, and the payees and endorsers thereof may recover as in case of such bills. Such a note, endorsed for value, before maturity, in the usual course of business, to a *bona fide* holder without notice, is not subject in his hands to the same defences as a note not payable at a bank in this State, nor governed by the law merchant. *Bremmerman* v. *Jennings*, 60 Ind. 175.

The notes in suit, not being payable at a bank in Indiana, are not commercial paper under section 5506, R. S. 1881, but being payable in another State, they are governed by the law of the place where they are payable. The presumption is, that the parties make their contract with reference to the law of the place where it is to be performed. *Hunt* v. *Standart*, 15 Ind. 33; *Rose* v. *Park Bank*, 20 Ind. 94; *Browning* v. *Merritt*, 61 Ind. 425. Where a note executed in this State is made payable at a named bank, the bank will be presumed to be in this State, if its locality is not designated. *Clark* v. *Carey*, 63 Ind. 105. But here the notes were expressly made payable at St. Louis, Missouri. They are therefore governed

by the statute of Missouri proved at the trial, and are to be deemed commercial paper.

The appellant claims that our statutes, R. S. 1881, sections 5503, 5504, 5505 and 5506, govern all notes not payable at a bank in this State, whether they be payable in this State or in any other State; but we can not adopt this construction. The notes being commercial paper by the law of Missouri, where they were made payable, and the plaintiff being a *bona fide* holder for value, before maturity, without notice, whatever defence the maker may have had, if the notes had not been commercial paper, or if the plaintiff had been notified of the defence, there was none which could prevail against the plaintiff as such *bona fide* holder. *Bremmerman* v. *Jennings*, *supra*.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Nov. 24, 1883.

---

No. 10,139.

| | |
|---|---|
| 91 | 451 |
| 137 | 557 |
| 91 | 451 |
| 162 | 462 |

## ANDERSON *v.* CALDWELL.

DRAINAGE.—*Constitutional Law.—Trial.—Jury.*—Section 4276, R. S. 1881, which provides that questions of fact in proceedings for drainage shall be tried by the court without a jury, is constitutional.

From the Boone Circuit Court.

*J. W. Clements* and *W. H. Thompson*, for appellant.

HAMMOND, J.—This was a proceeding, on the petition of the appellee, for the construction of a ditch, under "An act concerning drainage," approved April 8th, 1881, section 4273, R. S. 1881, *et seq.* The commissioners of drainage reported in favor of the work, and, also, reported their assessments of benefits and damages to lands affected by it. As to the land

of the appellant, they reported that it would neither be benefited nor damaged. To this he filed his remonstrance, raising issues of fact, and demanded that such issues should be tried by a jury. His demand was refused, and the case was tried by the court, resulting in a finding and judgment of approval and confirmation of the report of the commissioners. The appellant, by his exception, motion for a new trial and assignment of error, has properly presented in this court the question whether he was entitled to a jury trial.

Section 4 (4276, R. S. 1881) of the drainage act under consideration provides that "questions of fact shall be tried by the court, without a jury." This, it is claimed by the appellant, is in conflict with section 20, article 1, of the State Constitution, which provides that " In all civil cases, the right of trial by jury shall remain inviolate."

The rule of construction is well settled that an enactment of the Legislature is not to be struck down by the courts for unconstitutionality, unless it is clearly in conflict with the fundamental law. *Brown* v. *Buzan*, 24 Ind. 194; *Lafayette, etc., R. R. Co.* v. *Geiger*, 34 Ind. 185; *Groesch* v. *State*, 42 Ind. 547; Buskirk Prac. 352.

By section 1 of the code of 1852, and section 249 of R. S. 1881, every action "for the enforcement or protection of private rights and the redress of private wrongs" is "denominated a civil action." The words " civil actions," prior to the adoption of our present Constitution, were not so comprehensive in their meaning. They included only what were known as common-law actions. Section 20 of article 1 of the Constitution was adopted with reference to actions that by the common law were triable by jury. As to such actions the right of trial by jury was to remain inviolate. It was competent for the Legislature, as it did by the code of 1852, to extend the right of trial by jury to cases that previously had not been recognized as civil actions, but it could not, without infringing on the Constitution, abridge such right as to cases

triable by jury at common law. The Constitution simply guarantees the continuance of the common-law right of trial by jury. In other cases the Legislature may extend or limit this right, without violating the Constitution.

In *Lake Erie, etc., R. R. Co.* v. *Heath*, 9 Ind. 558, in speaking of the constitutional provision respecting jury trials in civil cases, this court says: "The above provision in our Constitution, applies in terms but to civil cases. What, then, within its meaning, is a civil case? Not every case which is not a criminal, is a civil one. 'Civil case' had a definition, a meaning, at common law, when the early Constitutions of this country were formed; and it has been held that the term was used in those Constitutions in the common-law sense."

Again, in *Allen* v. *Anderson*, 57 Ind. 388, it is said: "This provision" (section 20, article 1) "of the Constitution was adopted in reference to the common-law right of trial by jury, as the language plainly imports, namely, that the right 'shall *remain* inviolate,' that is, *continue* as it was. The words 'in all civil actions' mean, in all civil actions at the common law—as debt, covenant, assumpsit, trover, replevin, trespass, action on the case, etc."

Section 16 of the act of 1859, relating to supervisors, 1 R. S. 1876, p. 858, authorized the supervisor to enter upon any land adjoining or near any highway, and thereupon to construct ditches, etc., to remove gravel, etc., or to cut down and remove any wood or tree necessary for the construction or repair of a highway. The person aggrieved could petition the township trustee for an assessment of damages; the trustee thereupon appointed three disinterested persons to make the assessment of damages, which were paid out of the township fund. No appeal was provided for, nor any method of trial by jury; and yet the party injured had no remedy but that provided in the statute; he could not bring suit against the supervisor. It was held that this statute did not conflict with the Constitution. *Dronberger* v. *Reed*, 11 Ind. 420.

In the case of *Evansville, etc., R. R. Co.* v. *Miller*, 30 Ind. 209, which was an appeal to the circuit court from an assessment for damages sustained by the owner of land taken for the railroad, it was held that a jury trial was not allowable as a matter of right.

The question in the present case is whether the proceeding under the drainage act of 1881, for assessing benefits and damages to lands affected by the ditch, is a civil action, as that term was understood in this State prior to the adoption of our present Constitution. We are inclined to the opinion that this proceeding is not a "civil action," within the meaning of the Constitution. We think it is a special statutory proceeding, in which it is competent for the Legislature to dispense with a jury. *Hays* v. *Tippy*, *ante*, p. 102. At all events, we can not say with certainty that the statute under consideration, requiring the trial to be by the court without a jury, is clearly in conflict with the constitution. In such case, it is our duty to declare in favor of the constitutionality of the law, leaving the hardship, if any, to be corrected by the Legislature.

We find no error in the record.

The judgment of the court below is affirmed, at the costs of the appellant.

Filed Nov. 24, 1883.

ELLIOTT, J.—The gravity and importance of the questions involved in this case will, it is thought, be deemed a sufficient excuse for adding to what has been said by my brother HAMMOND.

The right which the Constitution declares shall remain inviolate is the right to trial by jury as it existed when that instrument was adopted. The right so carefully guarded and preserved is the one transmitted to us from our British ancestors. The right meant by our Constitution is the great one which has occupied such a prominent place both in law and in history. We are therefore to look to the common law

to ascertain what this right was, and not to particular statutes which may be changed at the pleasure of the Legislature. The Legislature neither created nor preserved this right, although they have often declared it. It exists without legislation.

The British Constitution does not limit the power of Parliament in the exercise of the right of eminent domain, and that body has power to direct the seizure of private property for public use without compensation. It is true that the British statutes have, in almost every instance, required compensation, but the right to compensation was a purely statutory one, and enforceable only under the provisions of the statute. Our own cases, and, indeed, the American cases generally, treat the proceedings as special statutory ones, and in this they are clearly right, for, at common law, the proceedings were of purely statutory origin, and they are none the less so under our Constitution. The Legislature is not invested by the Constitution with a new right, that of eminent domain, for that is an inherent right of sovereignty. On the contrary, the right is restricted, not enlarged, by the Constitution. If it were not for the constitutional limitation property might be seized without paying its owner any compensation. The right to compensation, therefore, did not exist before the Constitution, and is a right to be exercised by the Legislature in the enactment of statutes providing the mode of proceedure. In short, the mode of proceeding is within legislative control, limited only by the provisions of the Constitution.

In *Pennsylvania R. R. Co.* v. *Lutheran Congregation*, 53 Pa. St. 445, the question came before the court in proceedings instituted by the railroad company to condemn lands for a right of way, and the court held that the mode of proceeding was entirely within the control of the Legislature, and said: "Indeed the right of trial by jury has never been held to belong to the citizen himself in proceedings by the State under her

powers of eminent domain: *McKinney* v. *Monongahela Nav. Co.*, 2 Harris, 65." The question received careful examination *In Re Lower Chatham*, 35 N. J. L. 497, and the court, in speaking of the point made that the act violated the Constitution, said: "The answer to that is, that an appeal to a jury is not a matter of right. The provision in our Constitution, (Art. I, § 7,) that the right of trial by jury shall remain inviolate, does not interfere with such modes of ascertaining damages for lands taken by eminent domain, as the Legislature could provide before its adoption." In the recent case of *Kendall* v. *Post*, 8 Oregon, 141, it was said of the constitutional provision we are discussing, that "This constitutional provision does not apply to cases of taking private property for public uses, but to actions in courts of justice." To this effect runs the great current of judicial opinion. *Livingston* v. *Mayor, etc.*, 8 Wend. 85; *Beekman* v. *Saratoga, etc., R. R. Co.*, 3 Paige, 45; *Heyneman* v. *Blake*, 19 Cal. 579; *Buffalo, etc., R. R. Co.* v. *Ferris*, 26 Texas, 588; *City of Des Moines* v. *Layman*, 21 Iowa, 153; *Backus* v. *Lebanon*, 11 N. H. 19; *Rich* v. *City of Chicago*, 59 Ill. 286; *Ames* v. *Lake Superior, etc., R. R. Co.*, 21 Minn. 241.

The question here is not controlled by long continued practice as in the cases of *Lake Erie, etc., R. R. Co.* v. *Heath*, 9 Ind. 558; *Piper* v. *Connersville, etc., T. P. Co.*, 12 Ind. 400; *Coyner* v. *Boyd*, 55 Ind. 166; *Norristown, etc., T. P. Co.* v. *Burket*, 26 Ind. 53, and similar cases. Here the question is as to the power of the Legislature to adopt an express statute directing a trial by the court.

Matters of practice may always be changed and regulated by the Legislature, and long continued practice can not limit or restrict legislative authority.

Filed Nov. 24, 1883.

No. 8168.

## EVE *v.* LOUIS ET AL.

91 457
196 502
91 457
196 [illegible]
91 457
133 135

PLEADING.—*Demurrer.*—*Error.*—*Practice.*—A demurrer to a paragraph of answer, all the facts in which are available under another paragraph, searches the record, and should be sustained to a bad complaint; and if the complaint be bad it is error to sustain it to the paragraph of answer.

FRAUDULENT CONVEYANCE.—*Title.*—*Execution.*—*Pleading.*—When, for the purpose of defrauding his creditors, a debtor pays for lands, taking title thereto in the name of another, the lands may be sold on execution to satisfy a judgment of the creditor; but to maintain his title, or to establish it against the holder of the legal title, or those claiming under him, the purchaser upon the execution must show that, at the time of the conveyance, and at the time of sale, the debtor had not other property subject to execution sufficient to satisfy the judgment.

STATUTE OF LIMITATIONS.—*Counter-Claim.*—*Pleading.*—In pleading the statute of limitations to a counter-claim it must be shown that the bar of the statute had matured when the original suit was commenced, and it is not sufficient to aver a bar when the counter-claim was filed.

SAME.—*Quieting Title.*—*Sheriff's Sale.*—*Fraudulent Conveyance.*—A suit to quiet title by a purchaser at sheriff's sale, as against a fraudulent conveyance by the judgment debtor, is not a suit for relief against fraud in the sense of section 292, R. S. 1881, and the bar is not six years, but is fifteen years, if he be in possession; and if out of possession he could, at any time within twenty years from the time his right of possession accrued, quiet his title against any invalid adverse claim asserted at, or within fifteen years before, the commencement of suit.

From the Floyd Circuit Court.

*J. H. Stotsenburg* and *D. C. Anthony*, for appellant.

*A. Dowling*, *D. W. Lafollette*, *W. W. Tuley*, —— *Howard* and —— *Reed*, for appellees.

BLACK, C.—This action was commenced in the Clark Circuit Court. It was brought by the appellant, John G. Eve, against the appellees, Julius Louis and Heber B. Essington, upon four promissory notes, and to foreclose a mortgage on certain real estate in Clark county, given to secure said notes. The notes and mortgage were executed on the 25th of May, 1867, by the appellee Essington to one Libbeas Frisbie, who assigned them, without recourse on him, to one Tryphenia

Gresham, by whom, on the 24th of January, 1870, they were assigned to her daughter, Mary D. Gresham, who assigned them to the appellant. The appellee Louis was made a defendant, because, as stated in the complaint, he claimed to have some interest in the mortgaged property, which appellant alleged was inferior in equity and junior in time to his claim.

The subsequent proceedings, which will be noticed by us, were had in the Floyd Circuit Court, to which the venue was changed.

The appellee Essington answered by a general denial. He also filed paragraphs of special defence, to which appellant replied. These issues need not be further mentioned.

The appellee Julius Louis answered by a general denial, and filed a cross complaint. In his cross complaint he alleged that in the year 1860, and for many years before, one Robert H. Gresham, was the owner in fee simple and in the possession of the mortgaged property; that he afterward became involved in debt and embarrassed in his circumstances, and divers judgments were rendered against him by the courts of said Clark county for divers large sums of money, and divers executions were thereon issued, under and by virtue of which all his property subject to execution was levied upon, sold and conveyed by the sheriff of said county; that among his other property said real estate was, on the 31st of May, 1862, sold and conveyed, according to law, in fee simple, by said sheriff, to one Libbeas Frisbie; that at or about the time of said sheriff's sale and conveyance to said Frisbie, it was agreed and understood by and between said Frisbie and said Robert, that the latter should have the right to redeem said real estate from said sheriff's sale by paying to said Frisbie the amount of said Robert's indebtedness to him and interest thereon and all costs, and that upon such payment said Frisbie would reconvey said real estate to said Robert, or to such person or persons as he might appoint; that under and in accordance with said agreement,

said Robert, on or before the 25th of May, 1867, had fully paid said Frisbie said sum of money and all interest and costs, and was entitled to a reconveyance of said real estate by said Frisbie, as aforesaid; that on and before said last mentioned date, said Robert was indebted to the appellee Julius Louis and divers other persons in divers large sums of money, on which judgments had been rendered by the courts of said Clark county, which were then in full force, which would have at once become valid liens upon said real estate, if the same had been then conveyed to said Robert, and which he was *either utterly unable or unwilling* to pay off and satisfy; that on and before said last named day, said Essington was a partner of said Robert in the business of real estate agents, and was fully cognizant of his said agreement with said Frisbie for the reconveyance of said real estate, and also of said Robert's financial condition; that Essington was possessed of but little means, had no use for said real estate and no desire to purchase it, and, in fact, did not purchase it from said Frisbie, or from any one else; that said Robert was then very desirous of saving and securing to himself and his family said real estate from his said creditors, and, at his urgent solicitation and request, said Essington finally agreed that a deed might be made by said Frisbie and his wife, conveying said real estate to him, said Essington, for a certain specified consideration, that he would execute his notes for said consideration, to be secured by mortgage on said real estate, and that said notes should then and there be assigned to Tryphenia Gresham, wife of said Robert, and be held by her until such time as he or she could safely hold said real estate as against his said creditors, when said Essington would convey said real estate to said Gresham, or his said wife, and said Essington's notes should be surrendered to him, and his said mortgage should be satisfied; that, in accordance with this agreement, on said last named day, by the procurement and at the special instance and request

of said Robert, and of no one else, said Frisbie and his wife made a deed conveying said real estate to said Essington, and said Essington executed to said Frisbie the notes and mortgage described in the complaint, and said Frisbie assigned said notes, without recourse on him, to said Tryphenia; that when said deed was so made by said Frisbie and wife, said real estate, except as to the mere legal title thereto, was the absolute and exclusive property of said Robert, and neither said Frisbie nor his wife had any beneficial or pecuniary interest therein; that said Essington has never paid any money or other thing of value to said Frisbie, or any one else, for or on account of said real estate, or of any interest therein; that at the time of the execution by Essington of said notes and mortgage, he did not owe said Frisbie any money whatever, either for said real estate, or on any account, but they were executed without any consideration whatever therefor; that when they were endorsed by Frisbie, no money or other thing of value was paid or delivered to him, nor has there been, before or since, any such payment or delivery by said Tryphenia, or in her behalf, for or on account of said assignment of said notes, or either of them; that said deed from Frisbie and wife, and said notes and mortgage, and said assignment to said Tryphenia, were each and all parts of a single scheme of fraud, and were each and all made, or procured to be made, for the purpose of saving and securing to said Robert and his family said real estate, and with the intent to hinder, delay, or defraud said creditors of Robert; that at and before the 25th of May, 1867, and at and before the day on which the deed from said Frisbie and his wife to said Essington, and said notes and mortgage of Essington to Frisbie were executed, and at and before the time when said notes were endorsed to said Tryphenia, and at and before the endorsement of said notes by said Tryphenia to said Mary D. Gresham, daughter of said Robert, on the 24th of January, 1870, said Robert was justly indebted to the appellee

Julius Louis in a large sum of money to wit, $——; that afterward, on the — day of December, 1872, and before said Mary endorsed said notes to the appellant, said Robert being justly indebted to said Louis in a large sum of money, to wit, $——, which indebtedness was contracted by said Robert long before said 25th day of May, 1867, and still remains wholly unpaid, said Louis was compelled to, and did, commence an action against said Robert in the court of common pleas of said Clark county, for the recovery of the amount due on said last mentioned indebtedness; that such proceedings were had in said action in said court of common pleas, that, on the 17th of January, 1873, judgments were rendered by said court in favor of said Julius Louis and against said Robert, one for $775.60, without relief from valuation or appraisement laws and costs, and one for $—— and costs.

The issuing of execution upon said judgment for $775.60, the levying thereof upon said real estate as the property of said Robert, who was then in possession thereof, as he had been for more than twenty years, and the sale thereof by the sheriff to said Julius Louis in fee simple for $4,273.72 on the 8th of March, 1873, and the execution of a deed by the sheriff to said Louis, are stated at length.

It is further alleged that at the time of the rendition of said judgment in favor of said Louis against said Robert, and at the time of the issuing of said execution and the levy thereof, and said sale and conveyance to said Louis, said notes and mortgage were still in the possession and control of said Mary, and the pretended endorsement and assignment of said notes by said Mary to the appellant had not been made; that said Tryphenia endorsed and assigned said notes to said Mary without the payment of any money or any thing of value; that after the maturity of all of said notes, said Mary pretended to endorse or assign each of them to the appellant, but said endorsements or assignments were severally made without the payment of any money or thing of value therefor by

the appellant; that said several endorsements and assignments by Tryphenia and Mary were made in furtherance of said object, for which said notes and mortgage were originally executed, to enable said Robert to save and secure said real estate to him and his family from the appellee Louis and his other creditors, and with intent to hinder, delay or defraud said creditors of said Robert.

It is further alleged, that by virtue of said sale and conveyance to appellee Louis, and of the facts aforesaid, he has acquired a good and indefeasible title to said real estate, superior in law and equity to any claim, interest, title or lien of the appellant under and by virtue of said notes and mortgage and of said endorsements or assignments of said notes, but that said mortgage is a cloud upon his said title which ought to be removed; that his title, as against said mortgage, ought to be confirmed and forever quieted. And the cross complainant demanded judgment, that said notes and mortgage be declared fraudulent and void as against him; that the apparent cloud upon his title caused by said mortgage be removed, and that his title to said real estate be confirmed and quieted as against the appellee Essington and the appellant.

The appellant demurred to the cross complaint. The demurrer was overruled, and appellant answered the cross complaint in three paragraphs. The first was a general denial. The second alleged that the pretended cause of action set out in the cross complaint did not accrue within six years next before the commencement of the action on the cross complaint.

The third paragraph averred that the pretended cause of action set out in the cross complaint did not accrue within six years before the commencement of the suit.

Demurrers filed by the appellee Louis to the second and third paragraphs of appellant's answer to the cross complaint were sustained.

The cause was tried by the court; the finding was for the appellant against the appellee Essington upon the notes, and

for the appellee Louis upon his cross complaint against the appellant and the appellee Essington. Judgment was accordingly rendered, for the appellant against Essington, for the amount found due, and in favor of Louis, quieting his title to said real estate, the mortgage being adjudged void.

The appellant has assigned as errors the overruling of his demurrer to the cross complaint, and sustaining the demurrers to the second and third paragraphs of his answer to the cross complaint.

The cross complaint was professedly pleaded "for further answer and by way of cross complaint"; and the demurrer thereto was directed against it as an answer and as a cross complaint. The ground of the demurrer was want of sufficient facts. The appellee insists that the demurrer was insufficient in form to raise the question of the sufficiency of the pleading as a cross complaint. We deem it unnecessary to take space to discuss this question or to decide it. We will assume that the position thus taken by the appellee is correct. The paragraph in question was not an answer, but it was a cross complaint, and it was so designated in the answer thereto, and was so treated by the parties and by the court in the further progress of the cause.

The first paragraph of the answer to the cross complaint was a general denial. In an action to quiet title to real estate, every defence, either legal or equitable, may be given in evidence under an answer of general denial. R. S. 1881, sections 1055, 1071; code of 1852, sections 596, 612; *Milner* v. *Hyland*, 77 Ind. 458. But a defendant in such an action may plead his defences specially. *Over* v. *Shannon*, 75 Ind. 352, and authorities therein cited. Where the complaint in such an action is sufficient, and there is an answer of general denial with a special paragraph which does not state a sufficient defence, it will be substantial error to overrule a demurrer to such special paragraph. If the special paragraph state a sufficient defence, it will be error to sustain a demurrer

thereto, but it will be a harmless error. The reason for this is that under the general denial the defendant can have, upon the trial, the full benefit of all the facts constituting his special defence. *Abdil* v. *Abdil*, 33 Ind. 460; *Wood* v. *Crane*, 75 Ind. 207; *Over* v. *Shannon*, *supra*.

Sustaining a demurrer to a good special paragraph, in such a case, the general denial being in, is unavailable as error for the same reason as is sustaining a demurrer to one paragraph of a pleading in any other action, where there remains in such pleading another paragraph under which the party pleading it can have the benefit of the facts alleged in the paragraph to which the demurrer has been sustained, as fully as if the demurrer had not been sustained.

The demurrer to such a special paragraph has the character and potency belonging to a demurrer in other cases. It is a harmless error to sustain it, though a sufficient defence be alleged, simply because the special defence may still be available. But there will have been, nevertheless, in such a case, a ruling upon a demurrer which searched the record; and if the complaint be bad, the reason which makes sustaining the demurrer harmless error when the complaint is good, can have no application; the special answer will necessarily be good enough for a bad complaint, and the demurrer to the answer should be sustained to the complaint, and not to the answer.

Exceptions were taken to the rulings upon the demurrers to the second and third paragraphs of the answer to the cross complaint, and these rulings have been assigned as errors. The question whether the cross complaint stated facts sufficient is therefore before us. *Wiley* v. *Howard*, 15 Ind. 169; *Menifee* v. *Clark*, 35 Ind. 304; *Lytle* v. *Lytle*, 37 Ind. 281; *Batty* v. *Fout*, 54 Ind. 482; *Fox* v. *Wray*, 56 Ind. 423; *Haymond* v. *Saucer*, 84 Ind. 3; *Hamilton* v. *Huntley*, 78 Ind. 521 (41 Am. R. 593).

It is alleged in the cross complaint that after the year 1860 all the property of the debtor subject to execution was sold

and conveyed by the sheriff, the real estate in question being thus sold and conveyed to Frisbie in 1862. The only allegation in relation to the financial ability of the debtor at any time afterward is the averment that in 1867, when he had repaid Frisbie, the debtor was *either utterly unable or unwilling* to pay off and satisfy divers judgments then existing against him.

It is suggested by the appellant that the pleading is bad, for failure to show a necessity for resorting to the real estate in question because of the debtor's want of other property subject to execution sufficient to pay his debts. On the other hand, it is contended that the pleading showed that the real estate in controversy was held by Essington in trust for Gresham, the debtor; that it was therefore subject to sale on execution, and if Gresham had this real estate subject to execution, it was immaterial whether he had other property or not; and that as the mortgage was shown to have been given without consideration, as a part of a scheme of fraud, it could not be set up against the purchaser at the sheriff's sale. By way of answer to an objection which counsel seem to expect, that the conveyance to Essington was apparently absolute and unconditional, and that the trust alleged, being by parol, would not prevail against it, it is said that the rule providing that express trusts concerning land may be created only by writing does not apply to trusts created for the purpose of defrauding creditors.

After the conveyance to Essington, there was no trust for Gresham recognized as such by law. Where a debtor conveys his property to defraud his creditors, though upon a secret trust for his benefit, the conveyance is simply void as to the persons sought to be defrauded, though it is effectual as an absolute conveyance as between the parties thereto. R. S. 1881, section 4920.

Where a conveyance for a valuable consideration is made to one person, and the consideration therefor is paid by an-

other, and the conveyance is so made with the consent of the person paying the consideration and at his instance, and not upon an agreement, without any fraudulent intent, that the land, or some interest therein, shall be held in trust for the person paying the consideration, but for the purpose of defrauding his creditors, a trust results, not in his favor, but in favor of his creditors. R. S. 1881, sections 2974, 2975, 2976.

It may be admitted that when Gresham had paid Frisbie all the purchase-money, the latter, holding the legal title without fraud, and ready to convey it to Gresham, might be regarded as holding it in trust for Gresham, who by suit might have compelled Frisbie to execute the trust by conveying the legal title. Perry Trusts, sections 121, 231.

The question whether while the legal title was held by Frisbie the property was subject to sale under execution as the property of Gresham, does not arise in this case.

When Gresham, to defraud his creditors, caused the legal title to be conveyed by Frisbie to Essington, the case became one of a conveyance for a valuable consideration made to one person, the consideration therefor being paid by another.

In this State, under the decisions of this court, it is established that whether the land be fraudulently conveyed by the debtor himself or be purchased and paid for by him, the conveyance being made to another for the purpose of defrauding the creditors of the person paying the consideration, the land may be sold on execution in favor of the defrauded creditors. *Tevis* v. *Doe*, 3 Ind. 129; *Pennington* v. *Clifton*, 11 Ind. 162; *Hubble* v. *Osborn*, 31 Ind. 249; *Hanna* v. *Aebker*, 84 Ind. 411; *Sanders* v. *Muegge*, *ante*, p. 214.

If the fraudulent conveyance be not attacked without a sale on execution, by a suit which formerly would have required resort to a court of equity, it may be assailed after such sale, either as at law, in an action of ejectment, or as in equity, by

a suit to quiet the title of the purchaser either in or out of possession; or, under the code, the purchaser out of possession may sue in one action for possession and to quiet his title.

When the creditor, instead of first causing the land to be sold on his execution, attacks the fraudulent conveyance and seeks to subject the land to the payment of his judgment, he must show that at the time of the execution of the conveyance, and at the time of the commencement of such suit, the debtor had not other property subject to execution sufficient to pay his debts. And no distinction is made as to this requirement between the case of a conveyance made by the debtor himself, and the case of a purchase by him and conveyance to another; cases making such requirement in relation to conveyances of the former kind are numerous in our reports. The following are cases in which such requirement was made in relation to conveyances of the latter kind: *Baugh* v. *Boles*, 35 Ind. 524; *Pence* v. *Croan*, 51 Ind. 336; *Allen* v. *Vestal*, 60 Ind. 245; *Whitesel* v. *Hiney*, 62 Ind. 168. In *Noble* v. *Hines*, 72 Ind. 12, the conveyances were of both kinds.

*Pfeifer* v. *Snyder*, 72 Ind. 78, was a suit by a judgment creditor to have a deed which was made by his judgment debtor and a mortgage made by the grantee of the latter declared void for fraud on creditors, and to subject the land to the payment of the judgment, which had been rendered after the execution of the deed and the mortgage. It was held necessary for the complaint to show that at the time at which the conveyance was executed the debtor did not have other property left subject to execution sufficient to pay his then existing debts.

In *Ewing* v. *Patterson*, 35 Ind. 326, the action was commenced by Patterson against John G. Ewing and his wife on their note and their mortgage of real estate. Anspack and others filed a cross complaint, showing the recovery of a judgment by the cross complainants against John G. Ewing, and the purchase of the real estate in question by him with

his own means, and that, to defraud his creditors, he caused the land to be conveyed to his wife, and that he and his wife, for the same fraudulent purpose, executed the mortgage in suit to Patterson, and the cross complainants asked that the conveyance to Mrs. Ewing and the mortgage to Patterson be decreed void as to said judgment plaintiffs, and that the land be sold to pay the judgment. The cross complaint was held insufficient on demurrer of the mortgagee Patterson, because it did not allege that John G. Ewing did not possess other property subject to execution for the payment of the judgment.

In *Brown* v. *Wyncoop*, 2 Blackf. 230, it was held that the question whether a conveyance of land was made to defraud creditors may be examined and decided in an action of ejectment brought by one claiming title under a sale and conveyance thereof on execution. See Bump Fraud. Convey. 529.

*Holman* v. *Elliott*, 65 Ind. 78, was an action brought by one to whom certain real estate had been sold and conveyed under an execution, to recover possession thereof from one to whom it had been conveyed by the execution defendant before the rendition of the judgment on which said execution issued. It was held necessary to the plaintiff's recovery that it should be found that the execution defendant had not other property than said real estate at the time he made the deed attacked as fraudulent, out of which the judgment could have been collected in the usual course of execution.

*Law* v. *Smith*, 4 Ind. 56, was a bill in chancery by the devisees of the purchaser of land at sheriff's sales made under judgments against the grantor of the defendants, to set aside as fraudulent the conveyances to the defendants made prior to the rendition of said judgments. The question whether the conveyances to the defendants were fraudulent was examined and decided in the affirmative. In that examination it was said that a man indebted in a large amount "may undoubtedly make a voluntary conveyance that will be valid, as such a conveyance should not be attacked by creditors till after his other property is exhausted."

Now, if there be no necessity to resort to a suit as in equity to subject the land to payment of the judgment, but it may be subjected by execution issued on the judgment, the purchaser acquires through the sale and conveyance under execution the title to the land. But the fraudulent conveyance still remains as an apparently adverse title, a cloud upon the purchaser's title. By virtue of his title he may maintain ejectment or a suit to quiet his title. In such action or suit, as an incident thereof, he must attack the fraudulent conveyance which obstructs the title therein set up and shown by him; and the burden lies on him to show the fraudulent character of the conveyance thus assailed (*Brown* v. *Wyncoop*, *supra*); and it is, therefore, necessary for him to show that at the time of the execution of that conveyance, and at the time of the sale on execution, the judgment debtor did not have other property subject to execution sufficient to pay his debts. The mortgage made by the fraudulent grantee could not be assailed by the purchaser on execution without his impeaching the conveyance, for he would otherwise have no sufficient interest to assail the mortgage. And if he succeeded in impeaching the conveyance as fraudulent, he would thereby invalidate the subsequent mortgage as an encumbrance on his title.

For the want of such an allegation in regard to the financial condition of the judgment debtor, we think the cross complaint was insufficient.

As the cross complaint may be amended, it is proper to examine as to the sufficiency of the second and third paragraphs of the answer thereto.

A counter-claim or a set-off (where it may be barred by the statute of limitations), if not barred at the commencement of the action in which it is pleaded, does not become so afterward during the pendency of that action. *Walker* v. *Clements*, 15 Q. B. (N. S.) 1046; *Stillwell* v. *Bertrand*, 22 Ark. 375; *Brumble* v. *Brown*, 71 N. C. 513.

In the equity practice, the cross bill was generally considered as a defence or as a proceeding to procure a complete de-

termination of a matter already in litigation in the court. The cross bill was not an original, but was an ancillary suit, and it could be sustained only on matter growing out of the original bill, and the original and the cross cause were considered as one suit, and, ordinarily, were heard together, and the rights of all the parties in respect to the matter litigated were settled in one decree. Mitf. & T. Eq. Pl. 179; Daniell Ch. Pl. 1548, n. 1; *Id.* 1553, n. 3; Story Eq. Pl., section 400; 1 Van Santv. Eq. Pr. 223; *Kemp* v. *Mackrell*, 3 Atk. 812; *Field* v. *Schieffelin*, 7 Johns. Ch. 250.

Our code does not point out the mode of procedure for determining the rights of defendants as between themselves, and we resort to the rules of pleading and practice in courts of equity, modified by the spirit of the code (*Fletcher* v. *Holmes*, 25 Ind 458); and a defendant who desires affirmative relief against a co-defendant, touching the subject-matter of the complaint, files a cross complaint, which is an ancillary suit, or dependency on the original suit. The complaint and the cross complaint were pleadings in one suit.

Where there exists in favor of a defendant in a suit a cause of action not barred by the statute of limitations at the commencement of such suit, and, as here, of such a nature that it may be fully litigated in such suit, and ought to be set up therein and made a part thereof, he should not be obliged, while such suit is still pending, to sue upon his cause of cross action except in that suit; and if, in due course of the proceedings therein, he set up his cause of action which would have been good at the commencement of the suit, and still remains otherwise good, it ought not to be defeated by the fact that at the time of filing his pleading the period of limitation for instituting an independent action thereon has run out.

If, then, either the second or third paragraph of the answer could be applicable to the case sought to be made by the cross complaint, it would be the third paragraph only.

The case of *Law* v. *Smith, supra,* was governed by the law as it existed on the subject of adverse possession of defendants in ejectment before the enactment of the statute of limitations of 1852. It was held that any possession of the defendants that could be claimed as adverse to the title of the plaintiffs under the sheriff's conveyances, must have commenced at or subsequent to the dates of those conveyances, and that such adverse possession, to perfect the titles of defendants, must have continued twenty years before the commencement of the suit then at bar.

*Vanduyn* v. *Hepner*, 45 Ind. 589, was an action for the recovery of the possession of real estate, brought by one to whom, in 1838, it had been sold and conveyed by the sheriff under an execution on a judgment against Hepner, who theretofore had purchased and paid for the land and caused it to be conveyed to the defendants, his sons, to defraud his creditors. It was held that the question whether the conveyance to the defendants was fraudulent as to creditors of Hepner might be examined and decided in that action, and that the period of limitation for such a case is twenty years; that the limitation of six years for relief against frauds had no application. It was said: "In very many actions to recover the possession of real estate, the plaintiff's right to recover depends upon the question whether some deed, under which the defendant claims, is fraudulent and void. The statute provides, that actions 'for relief against frauds' shall be brought within six years. This provision applies to actions, the immediate and primary object of which is to be relieved from frauds, and not to actions to recover possession of real estate, though in order to avoid the defendant's defence, fraud may have to be shown. The latter class of actions can not be said to be actions for relief against frauds."

The conveyance which, in that case, was assailed as fraudulent, was made before the enactment of the provision of our statute of trusts and powers heretofore referred to, but it was

made to children of the person paying the purchase-money, and if made to defraud creditors, it would stand, as to the question whether it could be sold on execution against the father, or could only be reached in equity, on the same footing as the conveyance here in question. See Perry Trusts, sections 143, 149; Bump Fraud. Convey. 240, 530.

We are not required here to discuss the question as to what period of limitation would be applicable were the creditor seeking relief against the fraudulent conveyance and mortgage in controversy before sale on execution.

The cross complainant, as purchaser under an execution, sought to quiet his title derived under the sheriff's sale and conveyance. His right to recover possession accrued when he received that title, and would continue for twenty years from that time. To have his title quieted, if out of possession, his right to recover possession must not be barred by time. *Dumont* v. *Dufore*, 27 Ind. 263; *Murphy* v. *Blair*, 12 Ind. 184. If in possession, he could, at any time, have his title quieted against any adverse invalid claim of title or interest asserted at the commencement of his suit to quiet title, or at any time within fifteen years before the institution of such suit. At any time for twenty years after the accruing of his right to recover possession, he, if still out of possession, had a right to have his title quieted against any adverse invalid claim of title or interest asserted at or within fifteen years before the commencement of his suit.

Relief against fraud, though necessary to the success of the cross complainant, was merely an incident of his cause of action; and if either of the paragraphs of answer, under discussion, was in proper form for the application of any period of limitation to an action to quiet title, the period of six years was not applicable. See *Milner* v. *Hyland*, *supra*; *Carese* v. *Foster*, 62 Ind. 145.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellees,

and the cause is remanded, with instructions to sustain to the cross complaint of the defendant Julius Louis the demurrers to the plaintiff's answer thereto.

HOWK, J., having been of counsel, took no part in the decision of this cause.

Filed Nov. 24, 1883.

---

No. 11,225.

## CALVERT *v.* THE STATE.

CRIMINAL LAW.—*New Trial.*—By the provisions of section 1842, R. S. 1881, a motion for a new trial in a criminal case may be filed after judgment, during the term at which it was rendered.

SAME.—*Bill of Exceptions.—Time of Filing.*—A bill of exceptions filed in a criminal case during the term at which the cause is tried, or within such time thereafter, if leave is granted during the term, as the court may direct, not exceeding sixty days, is properly filed, and constitutes a part of the record.

From the Hamilton Circuit Court.

*W. Garver* and *F. B. Pfaff*, for appellant.

*F. T. Hord*, Attorney General, *W. A. Kittinger*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, J.—The present code of criminal procedure provides that a motion for a new trial may be filed after judgment and during the term at which it was rendered, and radically changes the rule of the former code and makes the decisions rendered under it inapplicable. R. S. 1881, section 1842.

A trial is regarded as an entirety and a bill of exceptions filed in a criminal case during the term at which the cause is tried, or within such time thereafter as the court may direct, not exceeding sixty days, is regarded as properly filed and as constituting a part of the record. It is, of course, essential that leave to file should be granted during the term at which the trial is had. *Bruce* v. *State*, 87 Ind. 450; *Pitzer* v. *In-*

91 473
194 336
91 473
139 500
91 473
141 466
91 473
147 45
91 473
152 297
91 473
157 152
91 473
163 347

*dianapolis, etc., R. W. Co.*, 80 Ind. 569; *Jenks* v. *State*, 39 Ind. 1.

In the case before us the trial was had and judgment rendered at the September term, 1883, of the Hamilton Circuit Court, and at that term a motion for a new trial was filed, leave obtained to file a bill of exceptions within thirty days, and a bill filed within the time granted. The bill is, therefore, properly in the record, and the motion for a new trial was filed in time.

An exception taken at the time the motion for a new trial is overruled presents the question, if properly followed up, of the sufficiency of the evidence to sustain the finding or verdict.

The State, however, in addition to the points which we have disposed of, makes and insists upon the point that there is no sufficient assignment of errors for the reason that the names of the parties are not given, and the provisions of the statute, as well as the precedents, require us to sustain this position. *Thoma* v. *State*, 86 Ind. 182, and authorities cited.

Judgment affirmed.

Filed Nov. 24, 1883.

---

No. 10,119.

## Dufour et al. v. Kious.

From the White Circuit Court.

*W. F. Hays, J. D. Works* and *J. A. Works*, for appellants.
*A. W. Reynolds* and *E. B. Sellers*, for appellee.

Franklin, C.—This case is, in all respects, similar to the case of *Dufour* v. *Kious*, *ante*, p. 409. Upon the authority in that case the judgment in this case must also be reversed.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and the case is remanded, with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings.

Filed Oct. 13, 1883.

No. 10,549.

## JONES *v.* JONES ET AL.

From the Madison Circuit Court.

*W. R. Pierse* and *C. B. Gerard*, for appellant.
*H. D. Thompson* and *T. B. Orr*, for appellees.

ZOLLARS, J.—Action by appellant to quiet his title to certain lands in Madison county. Appellees Ferdinand and John L. Jones, by guardian *ad litem*, filed a cross complaint, setting up title to the undivided one-third of the land, and asking for partition. The cause, being at issue, was submitted to the court and tried on the 17th day of June, 1882. Having taken it under advisement, the trial court, on the 21st day of June, 1882, being the 21st judicial day of the June term, made a finding that the cross complainants are the owners of, and entitled to, the interest claimed by them, rendered an interlocutory judgment fixing that interest, and appointed commissioners to make partition and report at the ensuing term. There is in the record what purports to be a bill of exceptions, filed on the 26th day of July, 1882. Contained in this bill is a written motion for a new trial. This bill was filed in vacation. The record does not show that time was given to file it, except as recited in the bill. Nor does the record show that a motion for a new trial was filed by appellant, except as recited in this bill of exceptions.

On the 24th day of October, 1882, being the 14th judicial day of the October term, the commissioners reported that the land could not be divided without damage to the owners. This report was approved, and a commissioner appointed to sell the land. After this order, appellant filed a motion for a new trial, stating as grounds that the decision of the court is not sustained by and is contrary to the evidence, and contrary to law, and that the court erred in excluding the testimony of a witness. This motion was overruled and appellant excepted.

On the 6th day of November, being the 25th judicial day of the October term, appellant filed a second bill of exceptions, which purports to contain the evidence. There is a statement in the record preceding the bill, that it was properly signed by the judge within the time given by the court. Whether filed within the time so given, or whether time was given at the June or October term to file the bill, does not appear. We can not presume that it was filed in pursuance of leave given at the June term. Having been signed and filed during the October term, it will be presumed that it was filed within the time given at that term. *Volger* v. *Sidener*, 86 Ind. 545.

The errors assigned in this court are, that the court below erred in overruling appellant's motion for a new trial, and in ordering the land sold.

It is contended by appellees that the motion for a new trial filed at the October term was too late to call in question the finding or decision of the court in ordering partition; that the bill of exceptions filed on the 26th day of July, in vacation, is not in the record, because the record does not show that time to file it was given at the June term, when the decision was made; that the statement in the bill, that time was given, is not sufficient, and, more, that if the bill was in the record, its statements, in relation to the filing of a motion for a new trial at the June term, can not be accepted or acted upon.

The North River Bank *v.* State, for use of Busenburg, Com. of Drainage.

In these several contentions appellees are correct. This case is clearly within the decision of the case of *Jones* v. *Jones*, *ante*, p. 72. Upon the authority of that case, to which we refer, the judgment in this is affirmed, with costs.

Filed Oct. 31, 1883.

No. 10,588.

## THE NORTH RIVER BANK *v.* THE STATE, FOR THE USE OF BUSENBURG, COMMISSIONER OF DRAINAGE.

From the Fulton Circuit Court.

*W. Niles*, for appellant.
*M. L. Essick* and *G. W. Holman*, for appellee.

BEST, C.—The State, on the relation of Isaac Busenburg, commissioner of drainage for Fulton county, brought this action against the appellant to enforce certain assessments made upon its lands for the construction of a ditch.

Judgment was rendered by default, and the appellant insists in its assignment of errors that the complaint does not state facts sufficient to constitute a cause of action. This assignment presents the same question that was decided adversely to the appellee in the case of *Scott* v. *State*, 89 Ind. 368, and for the reasons there given the complaint in this case must be deemed insufficient. The judgment should therefore be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at the appellee's costs, with leave to amend the complaint.

Filed Nov. 7, 1883.

## END OF MAY TERM, 1883.

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF JUDICATURE

OF THE

# STATE OF INDIANA,

## AT INDIANAPOLIS, NOVEMBER TERM, 1883, IN THE SIXTY-EIGHTH YEAR OF THE STATE.



No. 10,193.

## CASE ET AL. *v.* JOHNSON ET AL.

TOWN.—*Street Improvement.—Board of Trustees.—Jurisdiction.—Petition of Resident Lot-Owners.*—Under section 3364, R. S. 1881, the board of trustees of an incorporated town acquire jurisdiction of the improvement of a street within the town only when a majority of all the owners of any lots or parcels of land abutting on the street, residing within the town, shall petition the board of trustees for such improvement.

SAME.—*Contract with Town Trustee.—Violation of Penal Statute.*—Under the provisions of the act of December 21st, 1872, defining certain felonies and declaring contracts in respect thereto void (2 R. S. 1876, p. 454; sec. 2049, R. S. 1881), any contract or agreement made by the board of trustees with any town trustee or other officer of the town, for the construction of any public work of any kind for the use of the town, is absolutely void.

SAME.—*Compliance with Statute.—Uniform Rule.*—In all such cases the rule is uniform that there must be a strict compliance with the provisions of the statute; otherwise the proceedings are illegal and void.

From the Tippecanoe Circuit Court.

*R. C. Gregory, W. B. Gregory* and *F. B. Everett*, for appellants.

*J. R. Coffroth*, for appellees.

HOWK, C. J.—This case is now before this court for the second time. *Case* v. *Johnson*, 70 Ind. 31. On the former appeal it was held, by this court, on the authority of *Case* v. *Fowler*, 65 Ind. 29, that an instruction of the trial court was erroneous, and the judgment was reversed and the cause remanded for a new trial.

The suit was commenced by the appellees, seven in number, in the Benton Circuit Court, to enjoin the appellants, Case and Jones, from improving Fifth street, in the town of Fowler, in Benton county, under alleged contracts between them and the trustees of the town, for such improvement. The record shows that the town trustees, on the 18th day September, 1875, awarded the contract for four of the five sections of such street improvement to the appellant Case, and for the other section thereof to the appellant Jones; that, on September 20th, 1875, Case's written contract and bond for making such improvement were formally executed; that, four days afterwards, to wit, on September 24th, 1875, this suit was commenced; that, notwithstanding the institution and pendency of this suit, Case proceeded with the improvement of the sections of the street awarded to him; and that, on October 1st, 1875, one week after the institution of this suit, the town trustees rescinded their order awarding a section of the street improvement to the appellant Jones, and without any other or further notice awarded such section to the appellant Case, and ten days thereafter entered into a written contract with him therefor.

On the 16th day of November, 1875, the appellees filed, in the Benton Circuit Court, an amended complaint, wherein they alleged, among other things, that the appellant, the Town of Fowler, was an incorporated town organized under the general laws of this State, for the incorporation of towns; that the town board consisted of three trustees, of whom the appellant Jones was one, and the appellant Case was the assessor of such town.

"That at a meeting of said board of trustees, to wit, on the

28th day of July, 1875, the said defendant Case presented to said board a petition asking that Fifth street, in said town of Fowler, be properly graded and gravelled, commencing at the west line of Railroad street, where the same crosses said Fifth street, and from thence to the east line of the corporation; that said Case, then and there, represented to said board that said petition was signed by a majority of all the resident owners of the lots and parcels of land abutting on said portion of said Fifth street, so asked to be improved as aforesaid; that the said board, at their said meeting, granted the prayer of said petition and ordered said improvement to be made.

"That afterwards, to wit, on the 30th day of August, 1875, the said board met and adopted a grade for said portion of said street; and also, that the proposed grading and gravelling of said street be divided into sections; and also ordered that the clerk should give notice that the board would receive sealed proposals for the making of said improvement by sections.

"That afterwards, to wit, on the 10th day of September, 1875, the said clerk of said town caused to be published in the Benton Democrat, a weekly newspaper, published and of general circulation in said county, the following notice, to wit:

"'LEGAL NOTICE—NOTICE!

"'Notice is hereby given that the board of trustees of the town of Fowler, Benton county, Indiana, will receive sealed bids for the improvement of Fifth street, in said town of Fowler aforesaid, up to 12 o'clock M., of Saturday, September 19, A. D. 1875; plans and specifications can be seen by calling upon the clerk of said town board. The board reserves the right to reject any or all bids.

"'O. BARNARD, President.

"'Attest: J. F. WARNER, Clerk.'

"That the same was the sole and only notice ever given for the letting of the contracts for said improvement.

"That afterwards, to wit, on the 18th day of September,

1875, the said board met and awarded a pretended contract for the making of a part of said improvement, to wit, said sections or divisions numbered one, two, four and five (1, 2, 4 and 5), to said defendant Case; and also at the same time awarded a pretended contract for the making of a part of said improvement, to wit, section numbered 3, to said defendant Wm. M. Jones, who was then and still is one of said trustees.

"That afterwards, to wit, on the 20th day of September, 1875, the said board met and entered into a pretended written contract with said Case for making a portion of said improvement, and accepted the bond of said Case for the performance of the same, to wit, sections one, two, four and five.

"That afterwards, to wit, on the first day of October, 1875, the said board met, and rescinded its said order, dated September 18th, 1875, awarding said pretended contract for the making of a part of said improvement, to wit, section or division numbered three (3) to said defendant William M. Jones; and thereupon, without any other notice whatever, awarded a pretended contract for the making of said part of said improvement, to wit, said section or division numbered three (3) to said Case; that afterwards, to wit, on the 11th day of October, 1875, the said board met and entered into a pretended written contract for the making of said last mentioned portion of said improvement with said defendant Case, and accepted his bond for the performance of the same.

"That pursuant to said pretended proceedings of said board, and pursuant to said pretended contracts, but after the commencement of this action, the said defendant Case proceeded towards the making of the whole of said improvement, and that afterwards, to wit, on the 24th day of October, 1875, the said board met, and upon the application of said defendant Case, granted him an estimate for the portion of said improvement so then done by him, and ordered that the same should be liens on the lots and parcels of land abutting upon said portion of said street; and that afterward, to wit, on the 5th day of November, 1875, the said Case instituted in this

honorable court at the present term thereof civil actions against each of these plaintiffs, to recover from each of them the amount of the said estimate so pretended to be made chargeable against them respectively, and that said actions are now pending in this court.

"1. That a majority of the owners in number of said lots and parcels of land abutting upon said portion of said Fifth street so to be improved as aforesaid, or the majority of the owners of such lots and parcels of land, measuring the front lines of the same, residing in said town of Fowler, at the time of presenting said petition to said board, as aforesaid, had not signed said petition, or authorized the same to signed for them; and that the persons whose names appear upon said petition did not at said time constitute a majority of such resident owners of lots and parcels of land abutting upon said portion of said Fifth street either in number or amount of frontage of such lots or parcels of land abutting.

"2. That said petitioners asked that said Fifth street might be improved, as a whole, from the west line of Railroad street, where the same crosses the said Fifth street, to the east line of the corporation, and the said board granted said prayer, and ordered said improvement to be so made; that afterwards the said board, without the consent of said petitioners, ordered that said improvement should be made in five separate sections or divisions, and ordered the clerk of said town to give notice for the letting of the said work in sections as aforesaid; that the said clerk disregarded the order of said board, and gave notice that said work should be let as an entirety; the only notice ever given for the letting of the contract for said improvement was the notice hereinbefore set forth.

"3. That said board let the said contract for the making of said portion of said improvement, to wit, sections numbered 1, 2, 4 and 5, in sections as aforesaid, to said Case, without any notice whatever of such letting.

"4. That said board let a portion of said improvement, to

wit, said section or division three (3) to said William M. Jones, who was at the time a member of said board.

"5. That said board let a portion of said improvement, to wit, said section or division No. three (3) to said Case, without any notice whatever.

"6. Said board let said pretended contracts for said improvement, on *Saturday, the* 18*th* day of September, 1875, under said notice that they would let the same on *Saturday, the* 19*th* day of September, 1875, no other notice having been ever given."

Then follow averments that plaintiffs were each the owners of real estate which abuts upon said proposed improvement.

"That at all times, from the commencement of said proceedings until the commencement of this action, they protested against the same, and notified said defendants that they would not be bound by said proceedings, and would not pay any part of the cost of said proposed improvement." Wherefore, etc.

The cause was put at issue and submitted to the court for trial, and, at the request of the parties, the court made a special finding of the facts, and stated its conclusions of law thereon, in substance, as follows:

The following is a substantial statement of the facts found:

That said town of Fowler is, and was at the time hereinafter mentioned, incorporated pursuant to the general law of this State for the incorporation of towns; that Obed Barnard, John M. Dickson and the said appellant Jones were the only trustees of said town; and said appellant Case, during the time aforesaid, was the assessor of said town.

That on the 18th of July, 1875, appellant Case presented to said board of trustees a petition asking for the improvement of that portion of Fifth street which lies between Railroad street and the east line of the town, and which is over one mile in length. The improvement was to be by grading and gravelling. The petition was signed by a number of persons, some of whom signed only the initials of their Christian

names. Case's affidavit was endorsed on this petition, and stated "that the above and foregoing petition contains the signatures of a majority of all the resident property owners residing on said Fifth street, in the town of Fowler, from the crossing of the C. L. & C. railroad to the east boundary line of the corporation."

The following is the finding of the board as to the signing of the petition: "Which petition was duly signed by a majority of all the resident property owners fronting on each side of said street, upon the line of the proposed work, due proof of which was duly made by the affidavit of Horace S. Case, attached to said petition." That thereupon the board ordered the street to be improved as prayed for.

August 30th, 1875, the board adopted plans and specifications for the improvement, and ordered that the work should be divided and let in five different sections, which should be numbered sections 1, 2, 3, 4 and 5, and directed the town clerk to advertise that the work would be let separately in said five different sections.

September 10th, 1875, the clerk caused a notice of the letting of the work to be published one time in the county paper. This was the only notice, and a copy of it has already been set forth. Pursuant to this notice on Saturday, September 18th, 1875, the board awarded a contract for the improvement of sections 1, 2, 4 and 5 of said street to appellant Case, and awarded section 3 to said trustee Jones. The only bidders for any portion of said work were said Case and Jones, and also said appellees Johnson and Duncan McA. Williams. The said Johnson and Williams only bid on section 4. The length of the whole improvement is 5,534 feet, and the length of section 3 is 710 feet.

September 20th, 1875, Case entered into a written contract with the board, and also gave bond for the improvement of said sections 1, 2, 4 and 5 of said street. Four days after this (September 24th) this suit was begun. October 1st, 1875, (one week after this suit was begun) the board rescinded its

order of September 18th, whereby it had awarded a contract for the improvement of said section 3 to trustee Jones, and, without any additional notice of letting, awarded a contract for said section 3 to said Case; and on the 11th day of October, 1875, Case entered into a contract with the board (and two days thereafter gave bond), for the improvement of said section 3.

That pursuant to said proceedings and said contracts the said Case proceeded towards the making of said improvement; that on the 27th of October, 1875, the board granted him partial estimates for his work; that upon these he had instituted suit against each of the appellees in the Benton Circuit Court, to enforce a lien upon the property of each of them abutting on said street; and that these suits were pending at the time of the filing of appellees' amended and supplemental complaint.

The court then finds that each of the appellees (except Duncan McA. Williams, who was joined as a plaintiff because he was the husband of said appellee Elizabeth) is the owner of real estate which abuts upon said improvement, and which is described in the complaint.

"That from the commencement of said proceeding until the commencement of this action the said plaintiffs objected to the making of said improvement, and protested against the same, and informed said defendants of their said objection, and as soon as they, the plaintiffs, were informed of the awarding of said contracts by the said board to said defendants Case and Jones, to wit, on the 21st day of August, 1875, they, the plaintiffs, employed attorneys at law to institute an action to enjoin said defendants from proceeding any further with the making of said proposed improvement, under and by virtue of the proceedings aforesaid; and pursuant to such employment said attorneys instituted this action on the said 24th day of September, 1875," and applied to the judge of the court for a temporary injunction, but the same was refused.

That said board let the contracts for the improvement of said several sections of said street for the following prices:

| | | | | | | |
|---|---|---|---|---|---|---|
| Section | 1 | . . . . . | for | $1.45 | per | lineal foot. |
| " | 2 | . . . . . | " | 1.65 | " | " " |
| " | 3 | . . . . . | " | 1.70 | " | " " |
| " | 4 | . . . . . | " | 2.00 | " | " " |
| " | 5 | . . . . . | " | 3.00 | " | " " |

And that said Case had done $50 in value of labor on said improvement before the commencement of this action.

"Upon the facts there found, and as a conclusion of law, I find for the plaintiffs, and that they are entitled to a perpetual injunction in the premises.

(Signed) "DAVID P. VINTON, Judge."

Over appellants' exceptions to the conclusion of law, the court rendered its judgment and decree in accordance therewith, perpetually enjoining the appellants and each of them, their agents and attorneys, from proceeding any further with the improvement of Fifth street, in the town of Fowler, under the aforesaid contracts, or either of them; and that the appellant Case, his agents, and attorneys, be perpetually enjoined from prosecuting further his suits against each of the appellees then pending in the Benton Circuit Court, to recover the amounts of the several assessments mentioned in the complaint, and that each of the suits be dismissed by the appellant Case, at his costs.

From this judgment and decree the appellants have appealed to this court, and have here assigned as error that the trial court erred in its conclusions of law upon the facts specially found by the court.

The town of Fowler was incorporated under and pursuant to the general laws of this State, for the incorporation of towns. In section 3364, R. S. 1881, in force since April 27th, 1869, it is provided as follows:

"Whenever a majority of all the resident owners of any lots or parcels of land on any street or alley, not less than one square (to be estimated by numbers or by measuring the

front lines of such lots or parcels of land bordering thereon), shall petition the board of trustees of such town to grade, pave, gravel, or macadamize, or for either kind of said improvement, the board of trustees may cause the same to be done according to the specifications by them to be adopted, by contract given to the best bidder, after advertising to receive proposals therefor."

In *Town of Covington* v. *Nelson*, 35 Ind. 532, in construing the provisions of the section quoted, this court said: "The filing of the petition was necessary to confer jurisdiction upon the board of trustees. Without such petition, they had no power to pass the ordinance, or to make any contract in reference to the improvement of the said streets. Their whole action in the premises was absolutely void." So, also, in *Anthony* v. *Williams*, 47 Ind. 565, the court said: "In every case where an incorporated town seeks to improve the streets within its limits at the expense of the parties whose lots border upon the street, except in the case of a street 'around' the public square, there must be a petition signed by a majority of the property-owners upon which to base the action of the board; there must be specifications sufficient to show the kind, and quantity, and location of the work to be done; there must be an advertisement for proposals to do the work; a contract to do the work according to the specifications must be entered into," etc. To the same effect, substantially, are the following cases: *Moore* v. *Cline*, 61 Ind. 113; *Anthony* v. *Cooley*, 61 Ind. 323; *Overshiner* v. *Jones*, 66 Ind. 452; *Town of Tipton* v. *Jones*, 77 Ind. 307; *Mendenhall* v. *Clugish*, 84 Ind. 94.

Under the statute, it is necessary to the jurisdiction of the board of trustees of the town, over the subject-matter of the improvement of a street therein, that "a majority of all the resident owners of any lots or parcels of land," on such street, "shall petition the board of trustees of such town," for such improvement. There are two modes provided in the statute for estimating such "majority," namely: 1.

By numbers, if the lands abutting on the street are platted into lots, and the lots numbered; or, 2. By measuring the front lines of the lots or parcels of land bordering on such street. If the first mode be adopted, the petition must be signed by the resident owners of a majority in number of all the lots or parcels of land on the street to be improved; or, if the second mode be adopted, then the petition must be signed by the resident owners of the majority, or the greater part of the measured front lines, of the lots or parcels of land bordering on such street. The language of the statute is, by no means, free from ambiguity or uncertainty; but the construction we have given it seems to us to conform to the intent of the Legislature.

The court found, as a fact, that a petition was presented to the board of trustees of the town of Fowler for the improvement of Fifth street therein; and this petition is set out at length in the special finding of facts. The petition did not purport, on its face, to be signed by a majority of all the resident owners of the lots or parcels of land on Fifth street; nor did the evidence, upon which the board of trustees of the town seem to have acted in assuming jurisdiction of the improvement of the street, show or tend to show that the petition was signed by such a majority, in whatever mode the majority might be estimated. The statute requires that "a majority of all the resident owners of any lots or parcels of land," on the street to be improved, shall petition the board of trustees of the town for the proposed improvement, before the board is authorized to cause the improvement to be made. Manifestly, the petition of *less* than a majority of such resident owners would not confer jurisdiction of the contemplated improvement upon the board of trustees, nor authorize such board to cause the improvement to be made.

The record of the proceedings of the board of trustees of the town of Fowler, upon the petition for the improvement of Fifth street therein, was found as a fact by the court, and is set out in full in its special finding of facts. If this record

were wholly silent in relation to the evidence, upon which the board of trustees found and determined that the petition was signed by a majority of all the resident owners of the lots or parcels of land bordering on Fifth street, possibly it might be presumed in aid of the proceedings of the board, that its finding upon this jurisdictional question had been made upon sufficient evidence. But the record contains the entire evidence, upon which the board of trustees made its finding that the petition for the improvement of Fifth street had been signed by a majority of all the resident owners of lots or parcels of land on such street. In such a case the question is not one of presumptions, for none can be indulged; but it is a question, purely and simply, whether or not the evidence authorized the finding or conferred jurisdiction.

The entire evidence, upon which the board of trustees of the town of Fowler made its finding and assumed jurisdiction of the improvement of Fifth street, is contained in the affidavit of the appellant Case, attached to and following the petition. In his affidavit the appellant Case, on his oath, said, that "The above and foregoing petition contains the signatures of a majority of all the resident *property*-owners *residing* on said Fifth street, in the town of Fowler, from the crossing of the C., L. & C. Railroad to the eastern boundary of the corporation of said town." That this affidavit was the only evidence adduced before the board of trustees, is clearly shown by the record of the board, wherein it is stated that the "petition was duly signed by a majority of all the resident property-owners fronting on each side of said street, upon the line of the proposed work, due proof of which was duly made by the affidavit of Horace S. Case, attached to said petition." Certainly, this finding and conclusion of the board of trustees, upon the question of its jurisdiction of the proposed improvement of Fifth street, were not authorized by Case's evidence as set forth in his affidavit; for it was not shown by this affidavit, that the petition was signed by a majority of all the resident owners of the lots or parcels of land *fronting* on

the street; or, indeed, that it was signed by any owner of a lot or parcel of land, unless it can be said that the words "property-owners" necessarily mean owners of real property. Even if this could be said, the evidence would still be insufficient, because it would only show that the petition was signed by a majority of all the resident property-owners *residing* on Fifth street, instead of showing that it was signed by a majority of all such property-owners residing *in* the town of Fowler.

We are of opinion, therefore, that the board of trustees of the town of Fowler did not acquire jurisdiction of the improvement of Fifth street, and that the proceedings of the board in the premises were absolutely void.

In its special finding of facts, the court found, *inter alia*, as we have seen, that at, before and during all the times mentioned in such special finding, the appellant Jones was one of the three trustees of the incorporated town of Fowler, and the appellant Case was the assessor of such town. In section 1 of "An act defining certain felonies," etc., "declaring contracts in respect thereto void," etc., approved December 21st, 1872, it was provided, as applicable to the case in hand, that any "town trustee, * * * or any person holding a lucrative office under the Constitution or laws of this State, who shall during the time he may occupy such office, * * * be interested directly or indirectly in any contract for the construction of any * * * public building or work of any kind erected or built for the use of the * * * town * * * in the State in which he exercises any official jurisdiction; * * * shall be deemed guilty of a felony," etc. In section 4 of the same act, it was provided that "All contracts and agreements made between any persons in violation of this act shall be void." Acts 1872, Spec. Sess., p. 26; 2 R. S. 1876, p. 454; section 2049, R. S. 1881. Independent of the section of the statute last quoted, the general rule of law is well settled, that a contract prohibited by a penal statute is absolutely void. The courts will not enforce such contracts, but

will leave the parties who have contracted in violation of such a statute, without any remedy at law, whenever they are *in pari delicto*. *Deming* v. *State, ex rel.*, 23 Ind. 416; *Scotten* v. *State, ex rel.*, 51 Ind. 52.

Under section 15 of the general law of June 11th, 1852, for the incorporation of towns, in force at the time, the assessor of an incorporated town was an officer to be elected by the qualified voters of the town. 1 R. S. 1876, p. 877. Under section 45 of the same general law, the office of assessor of such a town was a "lucrative office," within the meaning of the felony act of December 21st, 1872, *supra*. Under section 1 of the latter act, the appellant Jones, as town trustee, and the appellant Case, as assessor of the town, were positively prohibited from becoming interested, directly or indirectly, in any contract for the improvement of Fifth street in the town of Fowler during the time they held their respective offices, under the penalty of being "deemed guilty of a felony," and suffering the punishment prescribed in the statute. And in section 4 of such act, it was expressly declared that all contracts and agreements, made in violation of the act, should be void. The appellants' contracts for the improvement of Fifth street, therefore, were illegal and void; and upon this ground there was no error in the court's conclusions of law.

When this cause was here before, 70 Ind. 31, it was held that the notice, given by the town of Fowler, of the letting of contracts for the improvement of Fifth street, was a legal and sufficient notice. Appellees' counsel now "challenge the correctness of that decision, and ask a reconsideration"; and they insist that the notice in question was fatally defective. Whether our former decision, that the notice was sufficient, is correct or incorrect, it must be regarded at least as the law of this case on the point then decided; and, therefore, we must decline to reconsider the question on this appeal. The opinion of the court on the former appeal shows the ground upon which it is claimed that the notice was insufficient. We advert to

this question here merely for the purpose of directing attention to the authorities, upon which counsel relies, in questioning the correctness of the former decision, as follows: *Steinmetz* v. *Signer*, 23 Ind. 386; *Wellman* v. *Lawrence*, 15 Mass. 326; *Ingersoll* v. *Kirby*, Walker Ch. (Mich.) 27; *McRee* v. *McRee*, 34 Ala. 165; *Moberry* v. *City of Jeffersonville*, 38 Ind. 198; *City of Logansport* v. *Puterbaugh*, 46 Ind. 550; *Sowards* v. *Pritchett*, 37 Ill. 517.

It is claimed by appellees' counsel that the proceedings of the board of trustees of the town of Fowler, for the improvement of Fifth street, and the contracts let in pursuance thereof, were illegal and void for another reason. The petition asked for the improvement of Fifth street, between the west line of Railroad street, where such line intersects Fifth street, and the eastern boundary line of the town of Fowler, as an entirety, and *not* in sections. On the 28th day of July, 1875, the petition was presented to the board of trustees then in session, and the board granted the prayer thereof, and ordered the improvement, as an entirety, to be made. On August 30th, 1875, the board of trustees in session ordered that the improvement be divided into sections numbered from 1 to 5 inclusive, and the work let to contract in such sections, and the town clerk was directed to advertise the letting of the work in such sections. The town clerk did not follow such direction, but advertised that sealed proposals would be received for the improvement of Fifth street as an entirety, instead of for sections of such street. The improvement of the street, however, was let in five separate sections, and the contracts were made accordingly.

Appellees' counsel earnestly insists that these proceedings of the board of trustees, or of the town clerk, were not authorized by the petition for the improvement of Fifth street, nor by the law of this State governing such proceedings. Thus, in *Kretsch* v. *Helm*, 45 Ind. 438, it appeared that a city clerk had been directed by a city ordinance to advertise for proposals to do certain work by publication in a newspaper

and by posting up notices, and had, in fact, given notice by publication only; and it was held that the letting of the contract, without having given the notice provided for in the ordinance, was illegal and could not be sustained. Besides, in this case, the street to be improved was nearly or quite one mile in length, and as, under the law, the cost of the improvement would be distributed along the entire length of the street, and assessed against the lots or parcels of land fronting on either side thereof, it may well have been that parties were induced to, and did sign, the petition for the improvement of the street as an entirety, who would not have signed any petition for the improvement of the street in sections or parts thereof. It may well be doubted, whether the board of trustees were authorized by the petition, or by the law governing their proceedings thereon, to let the improvement of the street, and contract for the work thereon, in sections or parts less than the entire street described in such petition. In all such cases as the one at bar, the rule has been repeatedly declared by this court, that there must be a strict compliance with the provisions of the statute; or, otherwise, it must be held that the proceedings are invalid, illegal and void. *Wilson* v. *Poole*, 33 Ind. 443; *Moberry* v. *City of Jeffersonville, supra; Merrill* v. *Abbott*, 62 Ind. 549.

Upon the whole case, we are of opinion that the court committed no error in its conclusion of law upon its special finding of facts.

As the judgment below must be affirmed upon the conclusion we have reached in the foregoing opinion, we need not and do not consider or decide any question arising under the cross errors assigned by appellees, in overruling their demurrer to the fourth paragraph of appellants' answer.

The judgment is affirmed, with costs.

HAMMOND, J., did not participate in the decision of this cause.

Filed Nov. 26, 1883.

No. 10,921.

## FAUST *v.* THE CITY OF HUNTINGTON ET AL.

CITY.—*Street.*—*Dedication.*—*Injunction.*—*Complaint.*—In a suit to enjoin a city from using a strip of ground as a street, the complaint must not only show that there has been no grant or condemnation of the land for a street, but, also, that there has been no implied dedication.

From the Huntington Circuit Court.

*J. T. Alexander* and *J. M. Hatfield*, for appellant.

*B. F. Ibach* and *L. P. Boyle*, for appellees.

ELLIOTT, J.—The complaint of the appellant alleges that in 1856 he and Lewis Hutzfield owned in severalty a tract of land adjoining the then town of Huntington; that in the year named Hutzfield platted an addition to the town, marked thereon streets and alleys, and duly recorded the plat; that the street known as Market street was platted fifty feet in width; that afterwards, in the year 1874, appellant laid off and platted an addition to the city of Huntington, and dedicated to the public use as part of Market street, sixteen feet, thus increasing the width of that street to sixty-six feet. The complaint, after stating the facts of which we have given a brief synopsis, proceeds as follows: "Plaintiff avers that said defendants, the city of Huntington and Patrick O'Brien, as city civil engineer of said city, are threatening to make permanent improvements on said street by gravelling the same and bouldering the gutters upon either side, and threaten to so locate said improvements as to place thirty-three feet on the north half of said street on the north side of the original dividing line between said Hutzfield and this plaintiff; and plaintiff further alleges that defendants are appropriating and threaten to further appropriate the lands and lots of this plaintiff for street purposes without any grant from this plaintiff or any one else in his behalf, or proceedings being had to condemn the land, and, unless enjoined, will so locate said improvements as to place the same on the lots of this plain-

91 493
183 [illegible]
91 493
143 200
91 493
145 25
91 493
148 106
149 281
149 282
150 550
150 554

tiff, thereby destroying permanent improvements erected by plaintiff on his premises adjacent to said Market street."

It is very certain that land can not be appropriated for the purpose of a street unless compensation is first assessed and tendered the owner. The complaint therefore shows, with sufficient certainty, that the land has not been seized by virtue of the right of eminent domain.

It shows also that the corporation of Huntington had not acquired a right by grant. This is as far as the pleading goes; it excludes the hypothesis of title by condemnation or grant, but it goes no further.

There is a way of acquiring lands for public purposes not included in either of the two methods we have mentioned, and that mode of acquiring lands for public use is by implied dedication. If a land-owner, by open and visible acts, unequivocally indicates to the public and to citizens that he intended to, and did, throw open a street to the public, and the citizens and the public have acted upon the faith that there was a dedication, the law will treat the acts of the owner as constituting an irrevocable dedication. In such cases there need be no grant. If the acts indicate an intent to dedicate, are so treated by the public, and there is an acceptance, then it is immaterial whether there was or not any express dedication. The principle upon which implied dedication rests is that which underlies the doctrine of *estoppel in pais*. In speaking of implied dedications, the Supreme Court of the United States said: "All that is required is the assent of the owner, and the use of the premises for the purposes intended by the appropriation. The law considers the owner's acts and declarations as in the nature of an estoppel *in pais* and precludes him from revoking the dedication." *Morgan* v. *Railroad Co.*, 96 U. S. 716. The Supreme Court of Illinois, in discussing this subject, said: "An examination of the cases referred to on the argument, will show, that dedications have been established in every conceivable way, by

which the intention of the dedicator could be evinced." *Godfrey* v. *City of Alton*, 12 Ill. 29. The cases sustaining the doctrine of implied dedication upon the ground that it exists wherever there is an unequivocal manifestation of that intent, and the owner's conduct has been acted upon by others, are very numerous, and we cite only a few of the many. *Doe* v. *President, etc.*, 7 Ind. 641; *City of Columbus* v. *Dahn*, 36 Ind. 330; *City of Evansville* v. *Evans*, 37 Ind. 229; *City of Cincinnati* v. *White*, 6 Pet. 431; *Rowan* v. *Town of Portland*, 8 B. Monroe, 232; *Holdane* v. *Trustees*, 21 N. Y. 474. In *Gwynn* v. *Homan*, 15 Ind. 201, it was said, in speaking of the act of dedication, that "Such fact may be shown by proof of acts on the part of the owner, such as selling lots on opposite sides of a strip of ground suitable for a street or highway, and standing by and seeing it used by the public as such; or standing by and permitting such user, for a time, and under circumstances, evidencing a dedication."

The intent to dedicate may in many instances be rebutted, but not in cases where there has been inexcusable neglect or fraud which has misled or deceived others.

In the present instance, the question is one of pleading and not of evidence, and our enquiry is whether the averments of the complaint are sufficient to show a wrongful threat to seize and improve the appellant's land as a public street.

It is a fundamental principle that the acts of public officers are presumed to be regular and legal until the contrary is made to appear. It devolved upon appellant to show by direct averment that the corporate officers were proposing to do a wrongful act. We think he has failed to do this. It will be observed that the statement of the complaint is that the defendants "are threatening to make permanent improvements on said street," and there can be no invasion of appellant's rights if the corporate authorities keep on the street. This statement, taken in connection with the fact that there is no averment that the street has not been set apart to public use

by an implied dedication, leaves the clear inference that there is a street, but not one created by grant or established under the right of eminent domain. If the question were one of evidence, it is possible that upon proof of an express dedication the appellant would make out a *prima facie* case, requiring the courts to limit the city to the highways located on the plat; but the question here is not one of evidence.

Where there is an intent to dedicate clearly manifested, and the public have used the way, then the right of the public will vest although a much shorter period than twenty years has elapsed. Judge Dillon says: "Where the *animus dedicandi* is established, no user for any definite period by the public is necessary." 2 Dill. Mun. Corp. (2d ed.), section 501. In an English case it was said: "No particular time is necessary for evidence of a dedication; * * if the act of dedication be unequivocal, it may take place immediately." *Woodyer* v. *Hadden*, 5 Taunt. 125. Our own cases recognize this rule. *Hays* v. *State*, 8 Ind. 425; *State* v. *Hill*, 10 Ind. 219; *Summers* v. *State*, 51 Ind. 201; *Mauck* v. *State*, 66 Ind. 177; *Ross* v. *Thompson*, 78 Ind. 90. It can not be said, therefore, that there has not been time sufficient to make the way a public one by implied dedication. In truth, there is nothing in the complaint to show that the way may not have been used as a public street long before 1874; nor, indeed, that the use may not have commenced as far back as 1836.

Where public or corporate authorities are threatening to do an act which may by lapse of time create a title which will deprive the owner of his land, he may maintain injunction even though he shows no actual damages. In such cases the writ operates to prevent the wrongful acquisition of title. The act of permanently appropriating private property to public use is more than a simple trespass. *Ross* v. *Thompson*, *supra*; *Sidener* v. *Norristown*, *etc.*, *T. P. Co.*, 23 Ind. 623; *Webb* v. *Portland*, *etc.*, *Co.*, 3 Sumner, 189; Broom Com. 93; Washb. Easements, 295; 2 Story Eq., section 924. The complaint, however, fails to make a case within this rule, for the reason

that it fails to show that the right to the street had not been acquired by the public by implied dedication.

Judgment affirmed.

Filed Nov. 26, 1883.

No. 9812.

## HOSE *v.* ALLWEIN, SHERIFF, ET AL.

JUDGMENT.— *Former Adjudication.— Mortgage.— Foreclosure.— Injunction.— Priority of Lien.*—U. was the equitable owner, by its terms, of a judgment, which, standing in the name of N., was a lien upon lands of H., which H. afterwards mortgaged to W. To a suit by W. against H. to foreclose, U. was made a party defendant, and appeared and pleaded that the mortgage to W. was fraudulent, it being alleged against him that he held liens upon the lands *subsequent* to the mortgage; but he did not set up the judgment as a lien prior to W.'s mortgage. A trial by jury in 1876 resulted in a verdict for W., and a decree of foreclosure against all the defendants, including U., and under this decree W. purchased the lands, and at the proper time received a sheriff's deed. An execution upon the first named judgment was afterwards levied upon the lands, and B. H., the heir of W., then dead, brought suit against the sheriff and N., the nominal plaintiff in the judgment, to enjoin a sale under the execution. *Held*, that the decree in favor of W. concluded U., and, also, N., from asserting the priority of the lien of the first named judgment, and that B. H. was, upon the facts stated, entitled to an injunction.

PRACTICE.—*Failure to Require Reply.*—Where a defendant goes to trial without requiring a reply to his answer, its allegations will be regarded as controverted by a general denial.

From the Whitley Circuit Court.

*T. R. Marshall* and *W. F. McNagny*, for appellant.

*W. Olds*, for appellees.

ZOLLARS, J.—The legal questions in this case are presented by a single assignment, viz.: The sustaining of a demurrer to the complaint. The complaint is very lengthy, and intended to present a number of questions. From the view we take of the case, it will not be necessary for us to notice many of its averments. The purpose of the action is to enjoin the

sale of certain real estate upon an execution in the hands of Allwein, as sheriff. The facts averred in the complaint which we need notice are, substantially, these: On the 16th day of January, 1874, Jacob Hose and wife, appellant herein, executed and delivered to one Theresa Winter, a mortgage in the sum of $3,000 upon the lands described in the complaint. Prior to September 3d, 1873, said Jacob Hose had executed certain notes to one Charles Ulerick, and at the same time, with his wife, executed to said Ulerick a mortgage securing the same. This mortgage was upon lands, other than those described in the complaint. Prior to said date, appellee Nix had become surety for Ulerick upon a note of $500. To secure him against loss by reason of suretyship, Ulerick assigned to him one of the notes so executed by Hose. The assignment upon the notes was as follows:

"April 13th, 1872. This is given as collateral security on a note to Peter Nix; amount $500. C. ULERICK."

Having become liable as such surety Nix, appellee, brought suit upon the note so assigned to him, and on the 3d day of September, 1873, recovered a judgment for the amount of the note, $1,141.62, and a foreclosure of the mortgage securing the same. The concluding portion of the judgment is as follows:

"And it is further found that said note and mortgage herein sued upon were given by the said Charles Ulerick to the said Jacob Nix as collateral security for the securement of said plaintiff upon a note held by Peter Nix, Sr., against the said Ulerick as principal and said Jacob Nix, plaintiff herein, as surety, which said note held by said Peter Nix, Sr., has been sued upon and judgment recovered against said Jacob Nix and defendant herein for $558.45. It is ordered that upon payment of said amount or satisfaction thereof, then any surplus shall be paid to said Charles Ulerick."

This judgment was so rendered at the request of Ulerick, and by agreement between him and Nix, as settling their rights in and to the judgment. On the 15th day of December,

1873, Nix caused an order of sale to issue upon the decree, and in January, 1874, bought in the mortgaged property for $700, by which he was fully indemnified; since which time he has had no further interest in the judgment, but the amount uncollected, if any, has belonged to said Ulerick.

At the September term, 1876, of the Whitley Circuit Court, Theresa Winter filed her complaint to foreclose the mortgage, and made parties defendants the makers, Jacob Hose and wife, Charles Ulerick, and other lien-holders. As to the defendants, other than the makers, it was averred, in her complaint, as follows: "And the plaintiff further complains and says that the other defendants, and each of them, have, or claim to have, liens upon said mortgaged premises by judgments or mortgage thereon, but plaintiff avers that their liens are subsequent to hers; and the plaintiff asks that they, and each of them, may be made defendants hereto, and required to set up any claim they may have on said premises, and that upon the sale of said premises upon an order of sale in this cause, the equity of redemption of all of said defendants may be forever barred and foreclosed, and for all other proper relief."

To this action Ulerick appeared and filed an answer. In addition to setting up a judgment against Jacob Hose, recovered in 1875, upon the notes above mentioned, and that the mortgage to Mrs. Winter, in suit, was fraudulent and void, the answer, so called, contained the following averments:

"That said Hose also gave this defendant one other note at said date for $1,000, secured by said mortgage on said premises (these were different lands from those claimed to be owned by the appellant), which note this defendant assigned to one Jacob Nix, who procured judgment against said defendant Hose for the amount due thereon, and judgment of foreclosure of said mortgage, and sold said mortgaged premises on said judgment of foreclosure, and purchased the same at such sale, and now holds the legal title." The prayer of said answer is as follows: "This defendant, therefore, asks that said

mortgage may be declared to be void as to him, and that the mortgaged premises be first subjected to the payment of the amount of the defendant's judgment herein described, and for other proper relief."

The cause was submitted to a jury, and after verdict for the plaintiff, Mrs. Winter, a decree was rendered foreclosing her mortgage against all the defendants, including Ulerick. An order of sale was issued upon this decree, the property was bought in by Mrs. Winter for the amount of her judgment, on the 7th day of July, 1877, and she paid the costs—$100. In July, 1878, she received a sheriff's deed. Theresa Winter died in 1879, and appellant being her daughter, and only heir at law, became the owner of the real estate in fee simple. In December, 1880, appellee Nix caused an execution to issue in his favor upon the judgment against Jacob Hose, and on the 18th day of January, 1881, appellee Allwein, as sheriff, levied the same upon the real estate thus inherited by appellant, and threatened to sell it as the property of Jacob Hose. It is this sale which appellant seeks to enjoin. In addition to the facts above set out, it is averred in the complaint that the question of the priority of liens upon said real estate, and the question of the validity and good faith of the Winter mortgage, were questions that arose in the pleadings and trial in the case of Winter *v.* Hose *et al.*, and that the priority of the lien of the Winter mortgage was fully and finally adjudicated, passed upon and settled, as against any liens in favor of Ulerick. All of the facts so stated in the complaint were admitted by the demurrer to be true.

It must be clear, we think, that so much of the judgment rendered in favor of Nix against Jacob Hose, as is uncollected, if any, now belongs, and at the time Ulerick filed his answer did belong, to Ulerick, and not to Nix. Any amount that Nix might now collect upon the judgment he would hold in trust for Ulerick. This being so, the question arises, what are now the rights of Ulerick in relation thereto, as against appellant, whose title comes through the decree in the case of

Winter *v.* Hose, Ulerick *et al.* It was charged in the complaint in that case, as we have seen, that Ulerick had, or claimed to have, liens upon the real estate by mortgage or judgments, and that whatever liens he might have were junior and subordinate to the mortgage of the plaintiff, Mrs. Winter. This complaint challenged Ulerick to set up whatever liens he had, and to disclose their nature. As we have seen, he answered the judgment in his favor against Jacob Hose rendered in 1875; but while he referred to the judgment in the name of Nix against Hose, he did not set it up as a lien prior to that of the Winter mortgage, or otherwise—did not aver that anything was due upon it. Being the owner of the judgment upon which the sale is now threatened, and not having set it up, it is too late now to insist, either by himself or Nix, that it is a lien upon the real estate, prior and superior to the lien of the Winter mortgage. He had his day in court, and it was clearly his duty to have set up whatever claim he had, whether senior or junior. It was alleged in the complaint that his liens were junior, and it was so adjudicated in the foreclosure of the Winter mortgage as a senior lien.

This conclusion is in accord with the adjudications of this court and the decided weight of authority. *Ulrich* v. *Drischell*, 88 Ind. 354, and cases cited.

In answer to some of the arguments of the learned counsel for appellee, we cite *Ætna Life Ins. Co.* v. *Finch*, 84 Ind. 301; *Harrison* v. *Phœnix Mutual Life Ins. Co.*, 83 Ind. 575.

So far as counsel base an argument upon the fact that the foreclosure suit of Theresa Winter against Hose *et al.*, was tried without a reply to Ulerick's answer, it is sufficient to say that Ulerick, having gone to trial without taking a rule, and insisting upon a reply being filed, the allegations of his answer will be regarded as controverted by a general denial. Works Pr., section 693.

It results from what we have said that the judgment sought to be enforced by execution against the real estate of appellant can not be so enforced, the averments of the complaint

being taken as true, and that the demurrer to the complaint should have been overruled. Having reached this conclusion, we do not extend this opinion to examine and decide other questions made by the complaint and argued *pro* and *con* by counsel.

Judgment reversed, with costs, and cause remanded, with instructions to the court below to overrule the demurrer to the complaint.

Filed Nov. 26, 1883.

No. 10,793.

## WOOLLEN *v.* WHITACRE.

91 503
127 180
91 503
131 464
91 502
138 305
139 211
139 395
91 502
158 175
158 177
158 182
91 502
159 12

INSTRUCTIONS.—*Credibility of Witnesses.*—It is an invasion of the province of the jury to instruct that it is their *duty* to consider the interest of a witness, his manner of testifying, the inconsistency of his statements, if any, and contradictory statements, if any, made by him in relation to the matter in question, in determining the credit to be given to his evidence.

VERDICT.—*Practice.*—Where a special verdict is not demanded, it is not the duty of the court to submit to the jury a form of special verdict prepared by a party.

SAME.—*Interrogatories.*—*Instruction.*—*Harmless Error.*—Where the jury, finding a general verdict, return answers to interrogatories sent to them, a refusal to instruct them to answer such interrogatories if they find a general verdict, is harmless.

EVIDENCE.—*Testimony of Witness on Former Trial.*—A refusal to permit a party to read to the jury only what purports to be the testimony of the opposite party on a former trial of the cause, and taken down and saved by a demurrer to the evidence then filed, is not error, it not appearing that the evidenee offered was in fact given at the former trial.

SAME.—Where a witness who testified on a former trial of the cause is not shown to be dead, it is not proper to permit proof of his evidence then given to go to the jury.

From the Huntington Circuit Court.

*W. H. Trammel, T. L. Lucas* and *W. W. Woollen*, for appellant.

HAMMOND, J.—Suit upon a promissory note, payable at the First National Bank of Indianapolis, alleged to have

been executed by the appellee to James B. Drake, and assigned to the appellant, by endorsement, for value, before maturity. The appellee answered, under oath, denying the execution of the note. Trial by jury; verdict for appellee; judgment on verdict over appellant's motion for a new trial. The only error assigned by the appellant is that the court below erred in overruling his motion for a new trial.

At the trial the appellant made the proper request for the court to give the jury the following instruction:

"The actions, appearance, manner of testifying and the circumstances that attach to and surround a witness, together with his interest, and consistency or inconsistency of statements, often determine, and properly, what weight a jury ought to give to such testimony. In this case, the defendant Whitacre is a competent witness in his own behalf, his interest in the result going only to his credibility; *but you have the right, and it is your duty, to take into consideration that interest, together with his manner of testifying and the consistency or inconsistency of his statements, if any; also, what contradictory statements, if any, he may have made in relation to the matter in suit.*" The court modified the charge by omitting the words in italics, and giving, in lieu thereof, the following: "And his testimony is to be considered the same as that of any other witness under the rule above stated."

The court had, in its charge immediately preceding the above, informed the jury, in substance, that, in determining the credibility of a witness, it was proper for them to consider his appearance, manner of testifying, his capacity for understanding and his means for knowing the facts about which he testified; also, his disinterestedness and freedom from bias or prejudice. The jury was also informed that they were the exclusive judges of the credibility of witnesses. Taking the charges together, we think there was no error in the modification complained of. Indeed, that part of the charge requested, and refused, told the jury, in substance, that it was their duty to consider, among other things, the in-

terest of a witness. If it be true, as a matter of law, that it is the *duty* of the jury to consider the *interest* of a witness in determining his credibility, then it would seem also to be their duty, as a matter of law, to give less weight to the testimony of a witness having an interest in the result of a suit than to that of one having no interest. However this may be as a matter of fact, it is not so as a matter of law. The decisions of this court are numerous to the effect that it is error for the court to say or intimate to the jury that any circumstance or fact should be considered by them to the disparagement of a witness's testimony. The court may properly say to the jury that, in considering the credibility of a witness, certain things may be considered by them; but it is error for the court to inform the jury, directly or indirectly, that such things must, as a matter of law, be regarded in determining the question of credibility. Whenever the court does so, it invades the province of the jury. *Nelson* v. *Vorce*, 55 Ind. 455; *Pratt* v. *State*, 56 Ind. 179; *Millner* v. *Eglin*, 64 Ind. 197 (31 Am. R. 121); *Works* v. *Stevens*, 76 Ind. 181.

The appellant, at the proper time and in the proper manner, requested the court to instruct the jury that they might find either a general or a special verdict; that if they found a general verdict, they must return answers to all the interrogatories submitted to them; and that if they found a special verdict, they need not answer the interrogatories. The appellant, at the time of requesting this instruction, submitted to the court a form for a special verdict, and also submitted interrogatories addressed to the jury. The court refused to submit to the jury the form for a special verdict and the interrogatories, until the appellant elected which he would have submitted, the form for a special verdict or the interrogatories, and also refused to give the instruction as requested. The record does not purport to contain all the instructions given by the court to the jury, and we must, therefore, presume that the court properly instructed the jury

that they might in their discretion return either a general or a special verdict. The appellant had the privilege, if he desired, of requesting the court to direct the jury to return a special verdict, in which case he could have submitted a form for such verdict. Section 546, R. S. 1881. In the absence of such request, he can not complain that the court declined to submit to the jury the form presented by him for a special verdict. As the jury returned with their general verdict answers to the interrogatories submitted to them, no harm resulted from the refusal of the court to instruct them that it was their duty to answer the same in the event they returned a general verdict.

It is shown by the bill of exceptions that the appellant offered to read in evidence before the jury, the testimony of the appellee, "purporting to have been given by him on the trial of this cause on the 26th day of March, 1877, and to have been taken down and saved by a demurrer to the evidence, then prepared by the plaintiff, and to have been filed in this court on the 27th day of March, 1877." The appellee objected to this evidence as being incompetent, and his objection was sustained. The bill of exceptions contains the excluded evidence.

We can not say that the ruling of the court was erroneous. It will be observed that the bill of exceptions does not show that the appellant proposed to read to the jury the evidence of the appellee given at the former trial from a record of the court, identified, proved or admitted to be the demurrer containing such evidence. He simply proposed to read what purported to be such evidence. The court held it incompetent, very likely, we may suppose, because there was no proof or admission that the evidence offered was in fact the appellee's evidence at the previous trial.

The bill of exceptions also shows that the appellant, for the purpose of rebutting the testimony of the appellee, offered to read in evidence the testimony of one George A. G. Sonner given at the former trial in behalf of the appellee. This

evidence was also claimed to be embraced in a demurrer to the evidence filed by the appellant at the former trial. The appellee's objection to its introduction, on account of incompetency, was also sustained. There was no evidence showing that the witness had deceased since the previous trial. We know of no rule that will admit the evidence given at a former trial of a witness not deceased, and who is not a party to the suit, except for the purpose of impeachment. And for the purpose of impeachment, where the witness is not a party to the suit, a bill of exceptions purporting to contain his testimony at a previous trial is not admissible in evidence. *Glenn* v. *State*, 46 Ind. 368.

It was said in that case: "The appellant might have proved the substance of the testimony of the witness on the former trial, by any person who had heard him testify, but the bill of exceptions embodying the evidence upon such trial was not admissible for that purpose. The witness was not a party to that action and was not bound by what was contained in the bill of exceptions. Such a practice might lead to very dangerous results." See, also, *Starrett* v. *Burkhalter*, 86 Ind. 439. The same reasoning is quite applicable to the testimony of a witness at a former trial, purporting to be contained in a demurrer to the evidence.

It may also be added that if testimony, at the former trial of Sonner, was offered for the purpose of impeachment, the appellant's brief has not called our attention to anything in the record that could, in any event, authorize its admission for that purpose. A witness can not be impeached by proving contradictory statements made by him, without first laying the proper foundation by asking him whether he did or did not make such statements, at the same time calling his attention to the time when, and place where, they are alleged to have been made.

The appellant urges that there were other errors in admitting certain evidence of the appellee, and in refusing to submit to the jury certain interrogatories propounded by the ap-

pellant. But he has not, in his brief, as required by rule 19 of this court, referred to the record by page and line where the evidence complained of, or the interrogatories mentioned, may be found. In such case, it is not our duty to search the record for errors. 2 Works Pr., section 1098.

At the trial there was some very strong evidence tending to show that the appellee signed the note sued upon. But he testified positively that he never signed it, directly or indirectly. There was also some evidence, of those acquainted with his handwriting, tending to show that the signature was not his. The execution of the note was the only matter in issue, and there being a conflict in the evidence, this court is compelled to accept the verdict of the jury, coming to us, as it does, approved by the trial court in overruling the motion for a new trial.

The motion for a new trial embraces causes not herein referred to, but, as they are not discussed in the appellant's brief, they must be regarded as waived.

Judgment affirmed at the appellant's costs.

Filed Nov. 26, 1883.

---

No. 10,812.

91 507
124 540

## Fowler et al. *v.* The State.

Criminal Law.—*Recognizance.*—*Forfeiture.*—*Justice of the Peace.*—*Change of Venue.*—One who is under recognizance in the form prescribed by statute, R. S. 1881, section 1644, to appear before a justice of the peace to answer a criminal charge, and who, upon obtaining a change of venue, fails upon the order of the justice to enter into a new recognizance for his appearance before the justice to whom the venue is changed, forfeits his recognizance.

Same.—*Complaint.*—*Exhibit.*—In a complaint upon a recognizance taken and forfeited before a justice of the peace in a criminal case, it is not necessary to exhibit a copy of the justice's certificate of forfeiture.

Same.—*Judgment.*—*Entry of.*—The statute, R. S. 1881, section 1489, prescribing the time when a justice of the peace shall enter his judgment, does not apply to criminal cases.

From the Henry Circuit Court.

*J. Brown* and *W. A. Brown*, for appellants.

*L. P. Newby*, Prosecuting Attorney, and *J. M. Brown*, for the State.

NIBLACK, J.—Action upon a forfeited recognizance in a complaint in two paragraphs. The first paragraph charged that on the 7th day of October, 1882, Thomas L. Fowler was arrested and taken before Alvin T. Burr, a justice of the peace of Henry township in Henry county, to answer a charge of selling intoxicating liquor to Martin Dalen, Jr., a person under the age of twenty-one years; that Fowler applied for and obtained a change of venue from said township, said cause being set for trial before Thomas F. Ice, a justice of the peace of an adjoining township in said county, on the 11th day of October, 1882, at 9 o'clock A. M.; that Fowler, as principal, and Martin Dalen, as surety, thereupon, on said 7th day of October, 1882, entered into a recognizance in the penal sum of fifty dollars, conditioned that the former should appear "before Thomas F. Ice, a justice of the peace in and for Henry county, on the 11th day of October, 1882, at 9 o'clock A. M., to answer to a charge of selling liquor to a minor, and abide the judgment of the court," which recognizance was taken and approved by Burr, as justice of the peace as herein above stated; that Fowler appeared before Ice at the time named in his recognizance, and filed his affidavit for a change of venue from him, the said Ice; that the venue was again changed to Wesley Dunbar of the same township with Ice, and Fowler was then ordered by Ice to enter into a recognizance in the penal sum of one hundred dollars, with surety, for his appearance before Dunbar to answer the charge against him, on the 18th day of October, 1882, at 10 o'clock A. M., the time fixed for the trial before said Dunbar; that Fowler failed to enter into a recognizance to appear before Dunbar, but, upon being called, made default. Whereupon the recognizance entered into by Fowler and Dalen before Burr, as above set forth, was declared and adjudged by Ice

forfeited, and Ice endorsed upon said recognizance a certificate, as follows:

"I, Thomas F. Ice, certify that the within Thomas L. Fowler did not discharge the within recognizance in this, that the venue of said cause was changed to Wesley Dunbar, and trial set for 9 o'clock A. M. on the 18th day of October, 1882, and I required and ordered said defendant to enter into a recognizance for his appearance at said time, which he refused to do, and I declared and adjudged this recognizance forfeited.

"THOMAS F. ICE, J. P."

That said recognizance, with the certificate endorsed thereon, was by Ice returned to the clerk of the Henry Circuit Court, and was filed by said clerk in his office.

The second paragraph charged the arrest of Fowler, his appearance before Burr, the change of venue to Ice, the entering into the recognizance by Fowler and Dalen, the failure of Fowler to appear before Ice, and the formal entry of a default and forfeiture against both Fowler and Dalen. A copy of the recognizance bond was filed with the complaint.

Demurrers to both paragraphs of the complaint were overruled; general denial; trial by jury; verdict for the State, assessing the damages at fifty dollars; new trial denied and judgment on the verdict.

It is claimed that when Fowler appeared before Ice, the obligation of his recognizance was fully discharged, and that, if he was afterwards permitted to depart without leave, it was an *escape* merely and not a *forfeiture* of his recognizance, and that hence the first paragraph of the complaint was bad upon demurrer. The criminal code provides that when a person is in custody upon a charge amounting only to a bailable offence, he may be released by entering into a recognizance with sufficient surety to answer the charge and abide the order of the court and not depart thence without leave. R. S. 1881, section 1704, *et seq.*

It is further provided that, "If, without sufficient excuse, the defendant neglect to appear for trial or judgment, or

upon any other occasion when his presence in court may be lawfully required according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and the recognizance of bail, or money deposited as bail, as the case may be, is thereupon forfeited." R. S. 1881, section 1721.

These provisions are equally applicable to proceedings before justices of the peace. R. S. 1881, sections 1456, 1630, 1631, 1632.

The recognizance bond in this case, as has been seen, required Fowler to appear before Ice "to answer to a charge of selling liquor to a minor, and abide the judgment of said court." This was in its legal effect an undertaking on the part of Fowler and his surety, that he, Fowler, would, in addition to appearing and answering the charge against him, abide by all lawful orders which might be made by the justice in the cause. Section 1715. When, therefore, Fowler failed to respond to the order of Ice, requiring him to enter into a new recognizance for his appearance before Dunbar, he forfeited his undertaking to abide by the judgment of Ice in the cause. Moore Crim. L., section 235; *State* v. *Thompson*, 62 Ind. 367.

It is further claimed that a copy of the certificate made by Justice Ice, and set out in the first paragraph of the complaint, as above, ought to have been filed with the second paragraph, and that this latter paragraph was fatally defective, because it was not accompanied by a copy of that certificate. The certificate in question was not the foundation of the action, but only presumptive evidence of the forfeiture of the recognizance to be used on the trial. Section 1631, *supra*.

A party is not required to plead his evidence. *Cassaday* v. *American Ins. Co.*, 72 Ind. 95; *Sedgwick* v. *Tucker*, 90 Ind. 271.

Ice was a witness at the trial, and when the entries on his docket pertaining to the forfeiture of the recognizance were offered in evidence, the defendants proposed to prove by him that these entries were not made until a week or more after

the alleged forfeiture occurred, but the court refused to admit the proffered evidence, and complaint is made here of that refusal of the court. The provision of the statute requiring docket entries by justices of the peace, in civil cases, to be made within a limited time, has been held, by this court, not to apply to criminal causes. *Wright* v. *Fansler*, 90 Ind. 492.

It is sufficient, in a criminal proceeding, in a justice's court, that the docket entries pertaining to it be made up in time to serve the purposes for which they are lawfully designed.

Other questions have been suggested in argument, but not presented with such formality as to require a decision upon them.

No adequate cause has been shown for a reversal of the judgment. The judgment is affirmed, with costs.

Filed Nov. 26, 1883.

---

No. 10,664.

91 511
127 37

91 511
128 330

91 511
126 427

## KENNEY ET AL. *v.* PHILLIPY.

JUDGE PRO TEM.—*Appointment.*—*Supreme Court.*—*Presumption.*—Where no objection to a judge *pro tem.* was made in the court below, the Supreme Court will presume that his appointment was valid unless it affirmatively appears otherwise by the record.

DEED.—*Consideration.*—*Evidence.*—Parol evidence is admissible to show that the consideration of a deed, recited therein to be one dollar, was in fact natural love and affection.

SAME.—*Statement of Grantor.*—*Res Gestæ.*—The statements of the grantor in a deed, which is in evidence, made at the time of its execution, are always admissible in evidence as part of the *res gestæ*.

SAME.—*Witness.*—*Agent.*—*Statute Construed.*—A scrivener employed to prepare a deed is not an agent contemplated by section 500, R. S. 1881, which makes a living party a witness to a transaction with one deceased when an agent of the deceased has testified concerning it.

NEW TRIAL.—*Evidence.*—*Supreme Court.*—The admission or exclusion of evidence can not be questioned on appeal to the Supreme Court, unless assigned as cause for a new trial.

DESCENTS.—*Reversion.*—An estate, granted in consideration of love and affection, reverts to the grantor, if living, upon the death of the grantee intestate, without issue, and unmarried. R. S. 1881, section 2473.

Kenney *et al.* v. Phillipy.

PARTITION.—*Title.—Estate for Life.—Former Adjudication.*—A judgment in partition, assigning a share of the land to one for life, who is really seized of the share in fee simple, gives the share in fee simple, having the effect merely to part the land, without otherwise affecting the title, unless an issue had been made and directly decided as to the title.

From the Superior Court of Marion County.

*P. W. Bartholomew* and *E. C. Buskirk*, for appellants.

*W. W. Herod* and *F. Winter*, for appellee.

ELLIOTT, J.—It is insisted by the appellants that the judgment should be reversed for the reason that the special judge, appointed to try this cause, had no authority to act as such. No objection was made in the court below, and appellants can not here successfully complain unless the record affirmatively shows that the appointment was without authority of law. This it does not do. There are cases in which a judge *pro tempore* may be appointed by a judge of the superior court, and as the record discloses nothing to the contrary we must presume this to be such a case. Presumptions are always indulged in favor of the action of the trial court, and, we must, therefore, presume that the appointment in this case was legal and regular. Of course, if the statute forbid such an appointment, or if the record showed the case to be one in which such an appointment could not be legally made, we should be bound to hold the proceedings void. This, however, is not such a case. The record being silent as to any objections to the appointment, and there being cases in which an appointment may be made, we must sustain the ruling of the trial court. *Zonker* v. *Cowan*, 84 Ind. 395; *Kennedy* v. *State*, 53 Ind. 542; *Winterrowd* v. *Messick*, 37 Ind. 122; *Feaster* v. *Woodfill*, 23 Ind. 493; *Kane* v. *State*, 71 Ind. 559.

This action was commenced by Margaret Coble to recover the possession of real estate; pending the action she died, and the appellee, having shown that he had purchased the land from her, was substituted as plaintiff.

The land in dispute was owned by the husband of Margaret Coble at the time of his death, and her interest is such

as she acquired as his widow. After her rights had vested she made a conveyance of the land to the children of John Coble, reserving to herself a life-estate; the consideration expressed in the deed is one dollar, but there is evidence strongly tending to show that no valuable consideration was paid. The children of John Coble died prior to the death of Margaret Coble, unmarried and without children surviving them.

The appellee was permitted to prove the actual consideration of the deed, and in this there was no error. Few rules are better settled than that which declares that the question of consideration is not closed by the recitals of the deed, and that the true consideration may always be shown by parol evidence.

What the grantor said at the time of making the deed, as to the consideration upon which it was founded, was properly admitted as part of the *res gestæ*. The declarations of a deceased grantor are not, it is true, admissible in favor of the heirs or executors, unless some rule of evidence would make them competent in his favor, if he were living and a party to the action; but when they are part of the transaction they are always competent. The rule which we deem the correct one is thus expressed in a recent work on evidence: "But the decedent's admissions and declarations are not competent in favor of the representative, unless some rule of evidence would admit them in favor of the decedent if living, as, for instance, where they were part of the *res gestæ* of an act properly in evidence." Abbott Trial Ev. 60; *Doe* v. *Reagan*, 5 Blackf. 217 (33 Am. Dec. 466); *Hamilton* v. *State*, 36 Ind. 280 (10 Am. R. 22); *Howe* v. *Yopst*, 20 Ind. 409; *Ghormley* v. *Young*, 71 Ind. 62; *Baker* v. *Gausin*, 76 Ind. 317.

Where declarations form part of the thing done, they are admissible in evidence whether the person by whom they were made is, or is not, a competent witness, and the fact that Mrs. Coble would not have been a competent witness is therefore unimportant.

A scrivener employed for the purpose of drafting a deed is

not the agent of the grantor, within the meaning of section 500 of the statute. R. S. 1881, sec. 500. An agent is, ordinarily, one who acts in his principal's place and behalf, and it is to this class of agents that the statute applies. In the present instance, the witness Trowbridge was employed not to make a contract, but to prepare the evidence of it, and it is very clear that to such the statute has no application.

It is a settled rule of practice that no questions upon the admission or exclusion of evidence will be considered on appeal unless properly presented by the motion for a new trial, and this rule precludes us from considering many of the questions argued by counsel, as the reasons assigned in the motion for a new trial are not sufficient to present them.

The 7th section of the statute of descents contains this provision: "An estate which shall have come to the intestate by gift or by conveyance, in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor, if living, at the intestate's death, saving to the widow or widower, however, his or her rights therein." We think the evidence brought the appellee's case fully within this statute. The recital of the nominal consideration of $1 was, as we have seen, not conclusive, and the evidence clearly shows that love and affection, and not the nominal sum named, was the real consideration. The land had reverted to Margaret Coble, and her conveyance vested a good title in the appellee.

During the lifetime of the children of John Coble, Margaret Coble instituted partition proceedings, and judgment was entered, partitioning the land, awarding to her the life-estate, and to John Coble's children the fee, and this decree is relied upon as estopping her grantee from claiming title. It is the law of this State that an ordinary judgment of partition does not create title, but simply makes division of the land. *Miller* v. *Noble*, 86 Ind. 527; *Utterback* v. *Terhune*, 75 Ind. 363; *Avery* v. *Akins*, 74 Ind. 283; *Teter* v. *Clayton*, 71 Ind. 237. It is also the law, as these cases show, that the

judgment in such a case does not operate upon after-acquired titles, and here the reversionary title of Margaret Coble was acquired after the death of John Coble's children. It is no doubt true, that an issue may be framed, directly presenting for decision, the question of title, and when such an issue is framed and directly adjudicated, the judgment will be conclusive. *Miller* v. *Noble, supra; McMahan* v. *Newcomer*, 82 Ind. 565; *Cravens* v. *Kitts*, 64 Ind. 581; *Milligan* v. *Poole*, 35 Ind. 64; *Godfrey* v. *Godfrey*, 17 Ind. 6. There was, however, in this case no such issue, and no such adjudication.

Judgment affirmed.

Filed Sept. 19, 1883. Petition for a rehearing overruled Nov. 26, 1883.

---

No. 10,304.

91 515
124 585
91 515
140 283

## MILLIKAN ET UX. *v.* PATTERSON.

TAXES.—*Sale of Land for.—Tax-Title.—Deed as Evidence.*—A tax deed made upon a sale of land for taxes in the form given by section 224, 1 R. S. 1876, p. 123, is *prima facie* evidence of the recitals therein; but if it recites facts not in the form, it is no evidence of their truth, and in no case is it sufficient evidence of title.

SAME.—*Evidence Necessary to Establish Title.*—To establish title upon a sale of lands for taxes, it must be shown that every material requirement of the law necessary to authorize the sale, from the listing of the land to the delivery of the deed, has been strictly complied with.

NEW TRIAL.—*Motion.—Amount of Recovery.*—Where a motion for a new trial assigns as causes only that the verdict is contrary to law and is not supported by the evidence, no question as to the amount of the recovery is presented.

From the Howard Circuit Court.

*J. C. Blacklidge* and *W. E. Blacklidge*, for appellants.

*C. E. Hendry*, for appellee.

HAMMOND, J.—Action by the appellee against the appellants to quiet the title to forty acres of land in Howard county.

The appellants answered jointly by the general denial. The appellant Frank M. Millikan also filed a cross complaint

against the appellee, asserting title to the same land under a tax deed, and asking to have his title quieted or his lien for taxes enforced. The appellee answered in two paragraphs, first, the general denial; and second, admitting the tax sale, but setting up facts showing it was invalid, and averring a tender before suit of the whole amount then due on the tax lien.

Trial by the court; finding and judgment for the appellee upon the question of title; also, that there was due the appellant Frank M. $52 on his tax lien to the date of the trial, but that on August 16th, 1881, the appellee had tendered $46.66, the amount then due. The decree directed the appellee to pay the appellant the amount last named within a time specified, and provided that, if he did not do so, the appellant should have judgment for $52, to be collected by sale of the land at the expiration of sixty days.

The appellants excepted to the judgment. They then moved for a new trial, because of error of the court in overruling their motion to suppress a deposition, and because the finding was contrary to law and not sustained by the evidence. This motion was overruled, and the appellants excepted. The only error assigned by them in this court is the overruling of their motion for a new trial.

There is no question in this court as to the form of the judgment. The appellants' exception to the judgment is not available here for the reason that the refusal of the court to sustain their exception is not assigned as error. *Clark* v. *Stephenson*, 73 Ind. 489; *Merritt* v. *Pearson*, 76 Ind. 44.

The alleged error of overruling the motion to suppress a deposition is not discussed in the appellants' brief, and is, therefore, regarded as waived.

The evidence is in the record. It shows a good title to the land in the appellee unless it was divested by the tax sale.

To support his claim of title under his counter-claim, the appellant Frank M. introduced no evidence except his tax deed. This was duly executed and acknowledged by the county auditor and witnessed by the county treasurer, February 21st,

1880. The tax sale, by the recitals in the deed, occurred February 12th, 1878, for delinquent taxes.

The tax deed follows the form prescribed in section 224, 1 R. S. 1876, p. 123, then in force, with a further recital to the effect that the owner of the realty had no personal property in the county out of which the taxes for which the land was sold could be collected.

Section 224, *supra*, provides that the tax deed shall be in the form therein given as nearly as the nature of the case will admit, and that it shall be conclusive evidence of all the facts recited in the deed. This relates to the facts in the deed where it follows the statutory form. If it recites facts outside of this form, it is not, as to such additional facts, either conclusive or *prima facie* evidence. The recital, therefore, in the tax deed under consideration, of the want of personal property out of which to collect the taxes for which the land was sold, is no evidence of that fact. But if it should be conceded that this deed was conclusive evidence of all the facts therein recited, including that in relation to the want of personal property out of which to make the taxes, the deed, without other proof, is still not sufficient to establish title. Laws in relation to the sale of land for non-payment of taxes are strictly construed. To prove a valid tax title, it is necessary to show that every material requirement of the law in every step necessary to be taken to authorize the sale had been strictly complied with. *Williams* v. *State*, 6 Blackf. 36; *Barnes* v. *Doe*, 4 Ind. 132; *Wiggins* v. *Holley*, 11 Ind. 2; *Gavin* v. *Shuman*, 23 Ind. 32; *Wilson* v. *Lemon*, 23 Ind. 433; *Ellis* v. *Kenyon*, 25 Ind. 134; *Steeple* v. *Downing*, 60 Ind. 478. It is said in Blackwell on Tax Titles, p. 65: "Each and every step, from the listing of the land for taxation, to the consummation of the title by the delivery of a deed to the purchaser, is a separate and independent fact. All of these facts, from the beginning to the end of the proceeding, must exist; and if any material link in the chain of title be wanting, the whole falls to the ground for want of sufficient authority to support it." The

principles thus stated are fully recognized and approved in the decisions of this court, above cited. Taking the facts recited in the statutory form of a tax deed as conclusively true, there are still many other important facts which must be proved, *aliunde*, to establish title. The tax sale in the present case was made under the statute of December 21st, 1872, and amendments thereto. It would tediously and unprofitably extend this opinion to follow the statute and show the various steps which are required to be taken, and of which the deed makes no mention, from the listing of the land for taxation to the delivery of the deed. The following references, in 1 R. S. 1876, will indicate some of the facts necessary to be proved to make a valid tax title, none of which are recited in the statutory form for a tax deed: Section 116, p. 102; sections 118 and 119, pp. 102, 103; sections 150 and 152, p. 111; section 180, p. 116, as amended, Acts Reg. Sess. 1877, p. 142; section 202, p. 120; section 196, p. 119; sections 277, 278, 279 and 280, p. 134; section 4, p. 140. There are doubtless other statutory provisions necessary to be complied with, and a compliance with which must be proved to make a legal tax sale so as to convey title, but the above will be sufficient to partially indicate how far short a tax deed comes from proving title. There is nothing in section 254 or 255, 1 R. S. 1876, p. 128, that in any way dispenses with the introduction of the evidence above indicated to prove a valid tax title.

The trial court properly held that the appellants' claim of title under the tax sale was not sufficiently supported by proof.

Having determined that the appellants' claim of title could not be upheld, the court, under section 257, 1 R. S. 1876, p. 129, then proceeded to ascertain the amount due the appellant Frank M., on his tax lien, and gave him judgment for $49.66, being the amount due up to the time of the alleged tender. The appellants insist, on several grounds, that the tender was not good, and that interest, at 25 per cent., should have been computed on the tax lien up to the date of the trial. But their motion for a new trial did not present that

question in the court below, nor is it presented in this court. This motion, as we have seen, outside of the alleged error in not suppressing a deposition, presented only two causes for a new trial, namely, that the finding was contrary to law and not sustained by the evidence. The appellants' claim, that the finding should have included interest to the date of the trial, is, in effect, a claim that the finding against the appellee is too small. "Error in the assessment of the amount of recovery, whether too large or too small," is the fifth statutory cause for a new trial. Section 559, R. S. 1881. This cause was not embraced in the appellants' motion for a new trial, and the question of the amount of the recovery being too small is not before us. *Frank* v. *Kessler*, 30 Ind. 8; *Floyd* v. *Maddux*, 68 Ind. 124; *Kelso* v. *Wolf*, 70 Ind. 105.

We find no error in the record.

Judgment affirmed, at appellants' costs.

Filed Nov. 26, 1883.

---

No. 10,843.

## Louisville, New Albany and Chicago Railway Company *v.* Detrick.

Railroad.—*Killing Stock.*—*Complaint.*—A complaint before a justice of the peace, under the statute, R. S. 1881, section 4025, to recover the value of a mare, which, with the other necessary allegations, avers that "where said mare entered upon said defendant's railway and was killed, said railway was not fenced at all," is sufficient on demurrer.

Same.—*Evidence.*—*Value.*—*Identification.*—In a suit to recover the value of an animal killed by the defendant, evidence of the value of the animal a month before the killing is admissible, though the witness can identify the animal only as one belonging to the plaintiff, *said* to have been killed.

From the Jasper Circuit Court.

*W. F. Stillwell*, for appellant.

*J. N. Wallace*, for appellee.

Niblack, J.—Action by Jacob Detrick against the Louis-

ville, New Albany and Chicago Railway Company for killing a mare on the 9th day of May, 1882, of the alleged value of $150, by running their locomotive and train of cars against, upon and over said mare, in the county of White in this State.

The complaint concluded with the averment, that "Where said mare entered upon said defendant's railway, and was injured, damaged and killed, said railway was not securely and lawfully fenced, and in fact was not fenced at all."

The action was commenced before a justice of the peace and brought by appeal to the White Circuit Court. It was thence taken, upon a change of venue, to the Jasper Circuit Court, where, at the January term, 1883, a demurrer was overruled to the complaint, and where, upon a trial by the court, there was a finding and judgment for the plaintiff for $140.

The first subject to which our attention is directed is that of the sufficiency of the complaint. It is argued that the averments of the complaint do not in any way connect the want of a fence with the injury to the mare; and the cases of *Bellefontaine, etc., R. W. Co.* v. *Suman*, 29 Ind. 40, and *Toledo, etc., R. W. Co.* v. *Stevens*, 63 Ind. 337, are cited as sustaining that assumption.

The complaints in those cases were, however, materially different from the complaint in this, and especially with reference to the point which those cases are cited as sustaining. On the contrary, we think the sufficiency of the complaint in this case is inferentially established by what was said and decided in those cases. See, also, the cases of *Ohio, etc., R. W. Co.* v. *Miller*, 46 Ind. 215.

Some questions upon the admissibility of evidence are also presented for our decision.

It was first made to appear by evidence, which seems to have been satisfactory to the court, that on the night preceding the day, and at the place named in the complaint, the mare was struck and fatally injured by the appellant's locomotive and train of cars. Accompanying evidence was also introduced touching the value of the mare, by witnesses who were well

acquainted with her and who saw her after she was injured. Thereupon one Lyman was introduced as a witness for the appellee, and over objections interposed on behalf of the appellant, was asked and permitted to answer questions as follows:

"Question. You may state, Mr. Lyman, if you saw or knew the bay mare of Mr. Detrick that was said to have been killed upon the railroad in May last? Answer. Yes, sir! I knew that mare.

"Ques. State now, Mr. Lyman, what that mare was reasonably worth during last May, or * * * at the time of her injury? Ans. The last time I saw the mare was in April. I approached Detrick and asked him if he would sell her.

"Ques. State what she was reasonably worth at that time? Ans. She would be worth about $140."

The objection urged to the first question is that it did not sufficiently indentify the mare, concerning which the enquiry was made. The answer showed that the witness clearly understood what mare was referred to by the question. Nothing more could have been accomplished by a more specific question, and we are unable to formulate any theory upon which the appellant could have been injured by the question. If there was, in fact, any mistake on the part of the witness. as to the animal to which he had reference, that was a matter which might have been brought out upon cross-examination.

It is objected to the answer to the second question, and to the third question and the answer to it, that they all refer to a period too remote from the time at which the mare was killed, and were hence incompetent as tending to establish the value of the mare when, or immediately before, she was killed.

It would seem to us to be prescribing too narrow a rule to hold that the period of time named by the witness was too remote to have any practical bearing on the value of the mare when she received her fatal injury, but, however that might be as an independent proposition, the evidence complained of was unquestionably competent, when taken in connection

with the testimony of other witnesses, who were acquainted with the mare at a later period, and who saw her after she was struck by the locomotive. *Toledo, etc , R. W. Co.* v. *Smith*, 25 Ind. 288. Similar questions are made upon the testimony of other witnesses who followed Lyman, but what we have said in principle disposes of all the questions reserved by the appellant on the admissibility of evidence.

The finding of the court appears to have been fairly sustained by the evidence, and nothing has been shown entitling the appellants to a reversal of the judgment.

The judgment is affirmed, with costs.

HAMMOND, J., did not participate in the decision of this cause.

Filed Nov. 26, 1883.

---

91 523
139 211

No. 10,191.

## DODD *v.* MOORE, BY NEXT FRIEND.

INFANCY.—*Complaint.*—*Next Friend.*—Where an infant sues by next friend, it is not necessary to aver in the complaint that the plaintiff is an infant, or that the written consent of the next friend had been filed.

INSTRUCTIONS.—Where it has been demanded that the instructions to the jury shall be in writing, it is not error to say orally to the jury that "the plaintiff has requested some instructions, which are in writing, and I will read them first, and I read them as the law."

SAME.—*Witnesses.*—*Credibility.*—It is error to instruct that the weight to be given to the testimony of the plaintiff and defendant, as witnesses, depends upon the interest each may have in the result of the suit.

From the Monroe Circuit Court.

*J. H. Louden, R. W. Miers, J. W. Buskirk* and *H. C. Duncan*, for appellant.

*J. R. East* and *W. H. East*, for appellee.

ZOLLARS, J.—Action by appellee, by her next friend, against appellant, to recover damages for an assault and battery and false imprisonment. Verdict and judgment for appellee. Appellant prosecutes this appeal, and assigns as error

the overruling of his demurrer to each paragraph of the complaint, and the overruling of his motion for a new trial.

Section 256, R. S. 1881, requires that before process shall issue in the name of an infant, who is a sole plaintiff, a competent and responsible person shall consent in writing to appear as the next friend of such infant, etc. The record in this cause shows that such written consent was executed and filed. It is contended, however, that as against the demurrer for want of sufficient facts each paragraph of the complaint is bad; the first and third because they do not contain an averment that the written consent had been filed, and the second because it does not contain an averment of appellee's infancy. Some of the earlier cases seem to support this contention, but in the later and better considered cases, which we follow, it is held that the want of such averments does not render the complaint bad upon demurrer. *Lancaster* v. *Gould*, 46 Ind. 397; *Lumpkins* v. *Justice*, 1 Ind. 557; *Rowe* v. *Arnold*, 39 Ind. 24; *Greenman* v. *Cohee*, 61 Ind. 201.

The fourth reason assigned for a new trial is the alleged giving of oral instructions, the court having been requested at the proper time to instruct in writing. If oral instructions were in fact given, the judgment must be reversed. We need not cite cases in support of this proposition. Before reading the written instructions, the court made an oral statement to the jury, as follows: "The plaintiff has requested me to give you some instructions which are in writing, and I will read them first, and I read them as the law."

We do not think that this amounts to an instruction, in the sense of the statute or the adjudicated cases. An instruction or charge is defined in Bouvier's Law Dictionary as follows: "The exposition by the court to a petit jury of those principles of the law which the latter are bound to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit." "The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are

bound by their oath and by moral obligations to obey." See, also, Thompson Charging the Jury, 141; Hilliard New Trials, 2d ed., p. 255; *Hasbrouck* v. *City of Milwaukee*, 21 Wis. 217; *Stanley* v. *Sutherland*, 54 Ind. 339; *McCallister* v. *Mount*, 73 Ind. 559.

The oral statement to the jury in this case is not the annunciation of any principle of law, nor is it a direction to them to guide them in arriving at a verdict. It is rather a declaration that the court had not, but was about to instruct them as to the law of the case. The judgment can not, therefore, be reversed because of the giving of an oral instruction. In thus deciding, however, we should not be understood as approving of the course of the court in making the statement to the jury. This habit of announcing to the jury that certain instructions have been asked by the parties is not unusual in the practice, but no satisfactory reason can be given for it, while many good reasons may be urged against it. Why should the jury be informed that certain instructions have been asked by the plaintiff or defendant? It is possible that the jury may give more or less force to the instructions thus asked, as they may have more or less confidence in the ability and fairness of the attorney upon one side or the other, who may have prepared them.

It is possible too, that the force of the instructions may be weakened, because asked by counsel instead of being given by the court of its own motion. If, by such announcement, anything may be added to, or detracted from, the force of the instructions, manifestly it should not be made. It is the duty of the court to instruct the jury, and whatever goes to the jury in the way of instructions, should go as the instructions of the court. If the instructions express the law correctly, they should be given, if not, rejected. Under the practice here disapproved, there might be a case in which this court would feel called upon to reverse the judgment.

Under the seventh reason for a new trial, it is insisted that the court erred in its fourth instruction to the jury. This

instruction is as follows: "The weight which you give the testimony of a witness depends upon the interest which such witness may have in the result of your verdict. You therefore give such effect and force to the testimony of the plaintiff and defendant as you think would be proper in view of what may be at stake to the plaintiff and to the defendant respectively." The jury have the right, in all cases, in weighing and settling conflicts in testimony, to consider the interest which the witnesses may have in the result of the litigation; and it is proper to instruct them that they may exercise that right. It may be that in many cases witnesses unconsciously warp and color their testimony by reason of interest; and it may be that, in many instances, witnesses purposely falsify by reason of such interest; but whether such is the fact, in any given case, is a question of fact to be left to the jury. Surely, the courts can not say, as a matter of law, that because a witness may have an interest in the litigation, less weight should be given to his testimony. In the instruction above set out, the province of the jury is invaded, and they are instructed, in effect, that, as a matter of law, less weight should be given the testimony of the parties, because they are interested in the result of the litigation.

This instruction is not in the exact language, but is, in effect, the same as that in the case of *Nelson* v. *Vorce*, 55 Ind. 455, which was held to be erroneous. See, also, *Greer* v. *State*, 53 Ind. 420; Thompson Charging the Jury, 58, 59.

It is true, that discredit is thrown on the testimony of both plaintiff and defendant, but that, in no way, cures the error. But for this instruction the jury might have given full credit to the testimony of appellant, and rendered a different verdict.

Other instructions state the rule correctly, as to witnesses generally, but this one is not withdrawn, directly or indirectly, nor does any of the others apply specifically to the parties to the action. There is a sharp conflict in the testimony, and we can not say that the error is harmless, because the verdict is right upon the evidence.

For the error in giving the instruction under consideration, the judgment must be reversed. As we have reached this conclusion, it is not necessary for us to consider and decide other questions discussed by counsel.

Judgment reversed, with costs; cause remanded with instructions to sustain appellant's motion for a new trial.

Filed Nov. 26, 1883.

91 526
128 828
91 526
146 42
146 295
91 526
163 118

No. 10,476.

## CARMICHAEL *v.* ADAMS ET AL.

MORTGAGE.—*Foreclosure.*—*Promissory Note.*—*Trial by Jury.*—*Constitutional Law.*—*Equity.*—In a suit on a note and mortgage, praying foreclosure, there is no constitutional right to a trial by jury.

From the Monroe Circuit Court.

*J. R. East* and *W. H. East*, for appellant.

*J. H. Louden* and *R. W. Miers*, for appellees.

ELLIOTT, J.—The provision of the Constitution which declares that "the right of trial by jury shall remain inviolate" does not enlarge the right, but simply ordains that it shall remain as it was when the Constitution was adopted. It preserves a right, but does not extend it. At the time the Constitution was adopted, suits in equity were always, as of right, heard and determined by the chancellor. As the right to a trial by jury did not exist in chancery proceedings at the time the Constitution was adopted, the provision respecting trial by jury does not prohibit the Legislature from declaring that suits in equity may be tried by the court. A suit to foreclose a mortgage was of purely chancery jurisdiction when our Constitution was adopted, and was a suit in which there was no right to a trial by jury.

The provisions of the code of 1881, concerning the trial of equity causes, are constitutional, and do govern suits to foreclose mortgages.

"Where a court of equity has obtained jurisdiction over

some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law." 1 Pom. Eq., section 231. Wherever equity jurisdiction is developed, it continues throughout the entire controversy, and ends only with a complete adjustment of the rights of the parties and the award of full relief. *Phelan* v. *Boylan*, 25 Wis. 679; *Henderson* v. *Dickey*, 50 Mo. 161; *McGowin* v. *Remington*, 12 Pa. St. 56; *Souder's Appeal*, 57 Pa. St. 498; *Oelrichs* v. *Spain*, 15 Wal. 211; *Hepburn* v. *Dunlop*, 1 Wheat. 179. In *Armstrong* v. *Gilchrist*, 2 Johns. Cas. 424, will be found an able review of the earlier cases by Chancellor Kent, and a clear statement of this great principle of equity.

The court, having acquired jurisdiction of the present case as a suit in equity to foreclose a mortgage, was not bound to dissect the suit into separate members, and try each separately, one member as a matter of law, and the other as a matter of equity, but had a right to treat the case as a unity, and as one of exclusive equitable jurisdiction.

There could, in such a case as this—a suit upon a note and mortgage—be no decree without an ascertainment of the amount due on the note, and, therefore, the whole matter was necessarily for the decision of the court. In order to determine whether the plaintiff was entitled to the relief sought, it was absolutely necessary to ascertain that there was a debt secured by the mortgage, for, if there was no debt, there was nothing upon which the power of the court could be exercised. It was not possible to make a step of progress in the decree without settling the question of the defendants' indebtedness.

Where questions are so closely blended and so firmly interlaced as in a suit upon a note and mortgage, there can be no severance and no separate trials. One trial, or, to speak more accurately, one hearing, ends the whole controversy.

It would lead to confusion and injustice to direct separate

trials in such cases. Should a jury find there was no right to recover on the note, and the court adjudge that there was a right to recover on the mortgage, there would then be a conflict not easily overcome. To be sure, the court might set aside the verdict and grant a new trial, but this, after all, would leave the control with the court, and it might just as well be there in the first instance. If, however, it be said that the court may not disturb the verdict, then we should have two conflicting decisions in one case upon the question of the defendant's indebtedness, and in that event no final result could ever be reached.

We know of no case where it can be necessary to go through two trials before different tribunals, one the jury and the other the court, to end one suit, reach one result, and secure one decree. We are not willing to create such a case.

The court below did not err in refusing to give a trial by jury and a hearing by the court.

Judgment affirmed.

Filed Nov. 26, 1883.

91 528
182 12
182 36

91 528
c188U8687

No. 11,081.

## Board of Commissioners of Howard County v. Armstrong, Guardian.

Taxes. — *Refunding of.—Statute Construed.— Voluntary Payment.*—Sections 5813 and 5814, R. S. 1881, require that taxes wrongfully assessed shall be refunded, though they have been paid voluntarily, but, in such case, it must appear not merely that the assessment was irregular, but also that the taxes were neither justly nor equitably due.

Same.—*Guardian and Ward.—Failure to List Ward's Property.—Fraud.—Illegal Assessment.*—Where a guardian, having funds of his ward, fails to list it as required by law, with intent to defraud the revenue, and the same is afterwards unlawfully assessed, and the taxes charged thereon voluntarily paid by the guardian, the statute does not authorize a refunding thereof, the assessment in such case not being *wrongful* in the sense of the statute.

From the Howard Circuit Court.

*J. O'Brien* and *C. C. Shirley*, for appellant.

*R. Vaile, J. B. Julian, J. F. Julian* and *W. W. Woollen*, for appellee.

NIBLACK, J.—This was a proceeding based upon a claim filed against the board of commissioners of Howard county, for the refunding of taxes under sections 5813 and 5814 of the Revised Statutes of 1881.

Addison F. Armstrong as claimant, in the similitude of a complaint, charged that he was guardian of the persons and estates of Carrie E. Matlock and Sabert S. Matlock, minor heirs at law of Jackson Matlock, deceased, and that on the 26th day of February, 1881, there was standing against him as such guardian, on the tax duplicate of Howard county as taxes assessed on the property of his wards, the sum of $95.48; that the treasurer of said county demanded of him payment of said taxes which he paid, over objection made by him; that of the amount so paid the sum of $13.74 was assessed for the year 1880, and was legally and properly assessed, but that the remaining sum of $80.34 was for taxes charged on property claimed to have been held by him as guardian during the years 1875, 1876 and 1878, which had never been regularly assessed and returned to the auditor for taxation by the proper assessor, but which had only been unlawfully placed on the tax duplicate by the treasurer, after it came into his hands, and had been brought forward by him and placed on such duplicate, in the same way, for the year 1880; that of said last named sum, which had thus been falsely demanded and collected, $64.18 was for county taxes, and $16.16 was for State taxes; that repayment of said sum of $80.34 had been demanded and refused.

In the circuit court, the commissioners demurred to the statement of claim filed as above for want of sufficient facts to constitute a claim for refunding taxes under the statute, but their demurrer was overruled. They then answered as follows:

"The board of commissioners of Howard county, Indiana, defendants, for answer to the complaint herein filed, say that the plaintiff, Addison F. Armstrong, as guardian of said Carrie E. Matlock and Sabert S. Matlock, ought not to recover as he has prayed in his complaint, because these defendants say that the said guardian of said wards was their guardian during the years 1875, 1876 and 1878, having been appointed in the year 1875, on the 19th day of March of that year, and has been continuously their guardian ever since, and is still their guardian, and that immediately after having become such guardian in said year, and prior to April 1st, 1875, he received the sum of $3,000 belonging to said wards jointly, and which was the amount of a policy of life insurance held by Jackson Matlock, the father of said wards, which was payable to them and for the exclusive benefit of said wards, and was paid in cash to said Armstrong promptly after he became their guardian. And soon after receiving the said sum of $3,000 life insurance money, said Addison F. Armstrong received the further sum of $3,000 in money belonging to his said wards jointly, from the settlement of the personal estate of said Jackson Matlock, and which was due them on distribution of their father's estate, and said Addison F. Armstrong had said sums of money in his hands at the times he was called upon by the assessor of Center township, Howard county, Indiana, which is the township where said guardian resides, also, the township in which his wards reside and their estate is situate; and said Addison F. Armstrong was for each of said years duly and legally called upon by the lawfully elected and duly qualified assessor of said township, but did not give in said property, or any part thereof, belonging to his said wards, to be listed for taxation, but fraudulently and wrongfully withheld the same from the assessor, with the fraudulent and wrongful intent of cheating, wronging and defrauding the State of Indiana and the county of Howard in said State, out of the lawful taxes and charges to said State and county from said guardian of said wards, for

the property so owned by them and properly chargeable with taxes; that afterward said property was properly assessed and put on the tax duplicate for the several years specified in said petition or complaint herein filed, and said Armstrong, petitioning plaintiff herein, with full knowledge of all the facts as to the manner of assessing said property for taxes, and of his wrongfully withholding said property from the assessor each year for which taxes were paid as claimed, voluntarily paid said taxes, with a full knowledge that said taxes were justly due and owing from his wards for property owned by them at the time of assessing, to wit: April 1st of each year, named in the complaint, without any protest whatever being entered by said Armstrong, or any other person in his behalf, as to the manner of assessing said taxes; that the said wards' property was not under levy, and no levy or other proceedings to make said taxes by distress were being urged or threatened, at the time of such payment, by said guardian of said several sums for taxables. Wherefore defendants say that said plaintiff, by his wrongful and fraudulent conduct, in not listing and assessing said property, and in paying said several sums without protest and voluntarily, when no proceedings were being urged to collect the same, is estopped, and can not recover for any or either of said items stated and contained in his complaint, and demands judgment for costs."

A demurrer was sustained to the answer, and the commissioners declining to answer further, judgment was rendered against them, ordering them to cause the sum of $64.18 to be refunded to Armstrong, as that amount of county taxes wrongfully paid by him, and directing them to certify to the auditor of State that the sum of $16.16 had been wrongfully paid by him as State taxes.

Questions are made here upon the decisions of the circuit court: *First.* Overruling the demurrer to the complaint. *Secondly.* Sustaining the demurrer to the answer.

Section 5813 of the statute is in these words: "In all

cases where any person or persons or body politic or corporate shall appear before the board of commissioners of any county in this State, and establish, by proof, that such person or body politic or corporate has paid any amount of taxes which were wrongfully assessed against such person or body politic or corporate in such county, it shall be the duty of said board to order the amount, so proved to have been paid, to be refunded to said payer from the county treasurer, so far as the same was assessed and paid for county taxes."

Section 5814 further provides that, "In all cases where a portion of the amount so wrongfully assessed and paid shall have been for State purposes, and shall have been paid into the State treasury, it shall be the duty of the said board of commissioners to certify to the auditor of State the amount so proven to have been wrongfully paid, under the seal of said board of commissioners; and the auditor of State shall, thereupon, audit the same as a claim against the treasury, and the treasurer of State shall pay the same out of any moneys not otherwise appropriated."

It is evident that formal and elaborate pleadings were not contemplated by the framers of the statute authorizing such proceedings as these. The presentation of a claim, and the establishment of it by proof, appear to be the only essential proceedings necessary to obtain relief under sections 5813 and 5814, set out as above. *Board, etc.*, v. *Wood*, 35 Ind. 70; *Board, etc.*, v. *Shrader*, 36 Ind. 87; *Board, etc.*, v. *Everett*, 51 Ind. 543; *Board, etc.*, v. *Ritter*, 90 Ind 362. But we know of nothing to prevent the parties, in a case like this, from making a formal presentation of facts as the ground of a claim upon the one side, or of the facts relied on as a defence upon the other, and from taking the opinion of the court, if the parties choose to do so without objection, upon the sufficiency of the facts thus formally presented. Such has been and continues to be the practice in cases somewhat, if not entirely, analogous. *Over* v. *Shannon*, 75 Ind. 352; *Puett* v. *Beard*, 86 Ind. 172 (44 Am. R. 280).

Where there is final judgment upon demurrer in such a case, the facts admitted by the demurrer supply the place of facts established by proof at a formal hearing, and the cause will be reviewed here upon the facts presented by the pleadings. Whether a judgment will be reversed for error in ruling upon the sufficiency of a pleading in a case like this, must depend upon the effect such ruling had, or probably had, upon the ultimate decision of the cause.

When, in such proceedings, proof has been made, and the judgment is right upon the evidence, the judgment will not be reversed because of some abstract error of ruling upon the pleadings.

The case of *Lamborn* v. *County Commissioners*, 97 U. S. 181, states the common law rule, touching the recovery back of money illegally paid, to be that "Where a party pays an illegal demand with a full knowledge of the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and can not be recovered back. And the fact that the party, at the time of making the payment, files a written protest does not make the payment involuntary."

Dillon on Municipal Corporations says that "Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, can not—there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law—be recovered back from the corporation, either at law or in equity, even though such tax, license, fee, or fine could not have been legally demanded and enforced." But, at another place, the same author states his conclusion to be that "Money paid by a person to prevent an illegal seizure of his person or property by an officer claiming authority to seize the same, or to liberate his person or property from illegal detention by such officer, may be recovered back in an action for money had and received,

on the ground that the payment was compulsory, or by duress or extortion. Under this rule, illegal taxes, or other public exactions, paid to prevent such seizure or remove such detention, may be recovered back, unless prohibited by some statutory regulation to the contrary."

Dillon further states that actions to recover back taxes "are usually brought *in assumpsit* for money had and received, are equitable in their nature, and lie for money actually paid to the corporation, and which it is against equity and good conscience it should retain. If a tax has been levied upon the plaintiff's property, and if that property is subject to the tax, the amount is justly and equitable due, and can not, for any *mere irregularities* in the detail or mode of proceeding, be recovered back." And, again, that "actions against a municipal corporation to recover back money upon the ground of *illegality of the tax or assessment* are, upon principle and the weight of authority, maintainable when, and in general only when, the following requisites co-exist: 1. The authority to levy the tax, or to levy it upon the property in question, must be *wholly wanting*, or the tax itself wholly unauthorized, in which cases the assessment is not simply irregular, but *absolutely void*. 2. The money sued for must have been *actually received* by the defendant corporation, and received by it for *its own use*, and not as an agent or instrument to assess and collect money for the benefit of the State, or other public corporation or person." Dillon Munic. Corp. (3d ed.), sections 939, 940, 941, 942, 943, 944, 945 and 946. Burroughs Tax. 266; Cooley Tax. 566, 567; *Bucknall* v. *Story*, 46 Cal. 589 (13 Am. R. 220).

It has been held, in this State, that in the absence of a statute authorizing such a proceeding, an illegal tax voluntarily paid can not be recovered back. *Jenks* v. *Lima Township*, 17 Ind. 326; *Board, etc.*, v. *Ruckman*, 57 Ind. 96.

As bearing upon the subject of voluntary payments, see also the cases of *Busby* v. *Noland*, 39 Ind. 234; *Town of Ligonier* v. *Ackerman*, 46 Ind. 552 (15 Am. R. 323); *Town*

*of Sullivan* v. *McCammon*, 51 Ind. 264; *Town of Edinburg* v. *Hackney*, 54 Ind. 83; *Town of Brazil* v. *Kress*, 55 Ind. 14; *Worley* v. *Moore*, 77 Ind. 567; *Powell* v. *Bunger*, 79 Ind. 468; *Brown* v. *Fodder*, 81 Ind. 491; *Town of Columbia City* v. *Anthes*, 84 Ind. 31 (43 Am. R. 80).

In the light of these authorities, the payment by Armstrong of the taxes in question, "over objection," simply did not constitute the payment an involuntary one in that sense which entitled him to recover back these taxes independently of any statute on the subject of refunding taxes. But, as will be observed, section 5813, R. S. 1881, to which reference has been made, changes the rule recognized by the authorities, cited as above, on the subject of refunding taxes, and requires taxes, however voluntarily paid, to be refunded upon proof that such taxes were *wrongfully* assessed; and the important question to be settled in this case is, what constitutes a *wrongful* assessment within the meaning of that section of the statute?

It was held by this court in the case of *State, ex rel.*, v. *Howard*, 80. Ind. 466, that a county treasurer, under section 94 of the act of December 21st, 1872, 1 R. S. 1876, p. 72, had no authority to assess taxes upon property omitted from assessment except for the current year.

It is maintained on Armstrong's behalf that a proper construction of the complaint in this case makes it mean that, after the tax duplicate for the year 1880 was delivered to the treasurer of Howard county, for the collection of taxes, he proceeded to make assessments of taxes against Armstrong as guardian, for property claimed to have been in his hands belonging to his wards, and omitted from assessment, during the years 1875, 1876 and 1878, and to charge the taxes so assessed for those years in gross upon the duplicate for 1880; that applying the doctrine of the case of *State, ex rel.*, v. *Howard*, *supra*, to the facts thus charged in this case, it must be held that the assessment of taxes by the county treasurer, for all the years previous to 1880, was irregular and un-

lawful, and consequently *wrongful* in the sense in which that word is used in the statute.

Webster defines *wrongfully* as meaning: "In a wrong manner; unjustly; in a manner contrary to the moral law, or to justice." *Unlawfully* is not the full equivalent of *wrongfully*. A thing may be *unlawful* without being contrary to good morals, or to natural justice. *Wrong* is the opposite to *right*, whether considered with reference to strict law, or the principles of equity. The word "wrongful," therefore, has a much broader and stronger meaning than the word "unlawful."

The plain inference appears to us to be that a tax may be *irregularly* and even *unlawfully* assessed, without inflicting a *moral wrong* or *an injustice* upon the owner or holder of the property upon which the tax is charged.

Accepting the construction of the complaint sought to be maintained, the assessments made by the county treasurer for all the years previous to 1880, were not only *irregular*, but *unlawful*, that is, without authority of law as to the manner in which they were made, and the payment of the taxes charged upon those assessments could not have been enforced. But the answer avers that Armstrong had the money in his hands upon which the county treasurer assumed to make assessments for the years 1875, 1876 and 1878; that this money was liable to taxation, but was each year fraudulently concealed from the proper assessor by Armstrong, and had in that way escaped taxation; that consequently the taxes charged by the county treasurer upon the duplicate for those years against Armstrong, as guardian, were justly and equitably due from his wards.

We think the rule laid down by Dillon, that to enable a party to recover back taxes voluntarily paid, he must show, not simply that such taxes were irregularly assessed, but that they were neither justly nor equitably due from him, applies to cases of the class to which this belongs, and is decisive of this case against the claim of the appellee. Property liable to taxation can not, in our opinion, be held to have been

*wrongfully* assessed in the sense in which that term is used in the sections of the statute before us, simply because some irregular or unauthorized method was resorted to in assessing taxes justly due upon it.

A careful examination of the authorities, as applicable to the facts of this case, has brought us to the conclusion that the complaint, considered as a formal presentation of the matters relied on for a recovery in this proceeding, was defective in not making it appear, by proper averments, that the taxes sought to be recovered back were neither justly nor equitably due from Armstrong's wards; also, that the facts set up in the answer constituted, in any event, a good defence to the complaint.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Filed Nov. 27, 1883.

---

10,825

## Robbins *v.* Board of Commissioner of Morgan County.

Township Trustee.—*Physician for Poor.*—*County Commissioners.*—A physician employed by a township trustee to treat the poor is not entitled to compensation from the county, if the county board has provided adequate medical service for the poor of his township. R. S. 1881, section 5764.

From the Morgan Circuit Court.

*J. V. Mitchell* and *J. F. Cox*, for appellant.

*L. Ferguson*, *G. W. Grubbs*, *M. H. Parks*, —. *Smock* and —. *Renner*, for appellee.

Hammond, J.—Appellant filed his claim before the Board of Commissioners of Morgan county for medicines furnished, and medical services rendered, to certain poor families in Brown township, in that county, at the instance of the township trustee. His claim not being allowed, he appealed to the

court below. The case was tried by the court, and, at the request of the parties, the court found the facts specially, and stated its conclusions of law thereon, in writing.

The following are the findings of facts and conclusions of law:

"1. That in the year 1882 the plaintiff was and yet is a reputable and practicing physician residing at Mooresville, in Brown township, Morgan county, Indiana, and during said year, as such physician, plaintiff furnished medicines and rendered medical assistance to William Kays and his family, and to the family of John Crayton, who were then and there temporary poor of Brown township in said county.

"2. That said services and medicines were so furnished and rendered by the plaintiff, under the employment and by authority of Thomas A. Richardson, who was then and there the trustee of said Brown township in said county; that said poor persons were sick, and needed proper medicines and medical attention.

"3. That said medicines and medical attention are worth the sum charged therefor by plaintiff, viz.: $62\frac{25}{100}$ dollars, and the same is due and wholly unpaid.

"4. That prior to and at the time said services were rendered by the plaintiff, the board of commissioners of said county had employed by the year four reputable, well qualified physicians and surgeons, viz.: Drs. Benj. Perce, Amos W. Reagan, Philip McNab and John M. Snoddy, all residing at the same place with the plaintiff, to attend to all the medical and surgical wants and cases of the temporary poor of the township in which the persons resided who were attended by the plaintiff, and embracing all the items in plaintiff's account herein.

"5. That said physicians were able and capable to render the services for which plaintiff claims judgment herein.

"6. That said physicians, nor either of them, were notified by said trustee, nor by any one else to perform such services.

"7. That this plaintiff had no knowledge that either of said physicians were, or were not, so notified.

"8. That said provision by said board of commissioners for the medical attendance upon all the temporary poor of said township where said poor persons were treated by plaintiff, and for which he brings his action, were ample and sufficient.

"Upon the foregoing special finding of facts the court renders the following as its conclusions of law:

"That plaintiff is not entitled to recover of said defendant for the services rendered and medicines furnished, which are claimed in this action, and that no liability exists upon the part of the defendant therefor.

"AMBROSE M. CUNNINGHAM, Judge."

The appellant excepted to these conclusions of law. He assigns in this court the following error: "The court below erred in its conclusions of law upon its special finding of the facts." The following sections are copied from the Revised Statutes of 1881:

"6066. The township trustees of the several civil townships of this State shall be the 'overseers of the poor' within their respective townships, and shall perform all the duties with reference to the poor of their respective townships that may be prescribed by law."

Section 6069 requires every county to relieve and support all poor and indigent persons lawfully settled therein whenever they stand in need of such relief and support.

"5764. It is hereby specially made the duty of such board" (the board of county commissioners), "to contract with one or more skillful physicians, having knowledge of surgery, to attend upon all prisoners confined in jail, or paupers in the county asylum, and may also contract with physicians to attend upon the poor generally in the county; and no claim of a physician or surgeon, for such services, shall be allowed by such board except in pursuance of the terms of such contract: *Provided*, That this section shall not be so construed as to prevent the overseers of the poor, or any one of them, in

townships not otherwise provided for, from employing such medical or surgical services as paupers within his or their jurisdiction may require."

It is manifest from the above that the support of the poor is made a county, rather than a township, charge. The township trustees in their respective townships perform such duties only with reference to the poor as may be prescribed by law. The county board may contract with physicians to attend upon the poor generally of the county. In the absence of such contract, trustees, in their respective townships, may, at the expense of the county, employ such medical and surgical services as the paupers within their jurisdictions require. But their authority to make such employment exists only where the county board has failed to engage medical services for the poor generally in their townships. The agency of the township trustee in this respect is special. If he exceeds his authority, the county is not bound. Those who accept employment from him for medical attendance upon the poor, must, at their own risk, enquire into his power to bind the county.

The decisions of this court fully sustain these views. *Mullen* v. *Board, etc.*, 9 Ind. 502; *Board, etc.*, v. *Wheeldon*, 15 Ind. 147; *Board, etc.*, v. *Boynton*, 30 Ind. 359; *Conner* v. *Board, etc.*, 57 Ind. 15.

The facts found specially by the court show that the appellant's employment by the township trustee to render the medical services to the poor, for which he sues the county, was not authorized by statute. The county board had already made ample provision by the employment of competent physicians and surgeons for the medical wants of the poor of that township. The county was not liable, therefore, for the payment of the appellant's services. The court below did not err in its conclusions of law.

Judgment affirmed, at appellant's costs.

Filed Nov. 27, 1883.

No. 10,126.

## TOWN OF CICERO ET AL. v. WILLIAMSON ET AL.

91 541
130 412

91 541
136 597

91 541
140 254

91 541
152 575
152 576

91 541
153 525

TOWN.—*Annexation of Territory.—Order of County Commissioners.—Jurisdiction.—Collateral Attack.*—The proceedings of the board of county commissioners annexing territory to an incorporated town, if jurisdiction was acquired, can not be questioned collaterally.

SAME.—*Petition.*—When the petition contains enough to show that the subject-matter is within the jurisdiction, its sufficiency in other respects can not be questioned collaterally, nor can the formality of the proceedings of the trustees of the town.

SAME.—*Names of Owners.*—The failure of the petition to name the owners of the lands sought to be annexed will not warrant a collateral attack upon the action of the county commissioners.

SAME.—*Notice.*—The service of personal notice upon known residents of the county whose lands it is sought to annex is, as to them, necessary to give jurisdiction, and a failure to do so renders the proceeding void upon collateral attack. R. S. 1881, section 3389.

SAME.—*Taxes.—Injunction.—Parties.—Joint Complaint.—Judgment.*—Where several owners of lands unite in a complaint to enjoin an incorporated town from collecting taxes upon their lands, upon the ground that no notice at all had been given, there can be no separate decree in favor of one of the plaintiffs.

INJUNCTION.—An injunction will not be granted to restrain the enforcement of a decision of a judicial tribunal of competent jurisdiction upon questions of fact.

SAME.—*Question of Fact.*—Whether territory is or is not contiguous to corporate limits, is a question of fact for the decision of the board of commissioners.

From the Hamilton Circuit Court.

*T. J. Kane* and *T. P. Davis*, for appellants.

*F. M. Trissal*, for appellees.

ELLIOTT, J.—The appellees sought and obtained an injunction prohibiting the town of Cicero from collecting taxes upon real estate owned by the appellees. The ground upon which this relief was awarded was that the land upon which the taxes were assessed had not been annexed to the town.

It is now settled law, that proceedings to annex contiguous territory to incorporated towns or cities can not be set aside upon the ground that the proceedings of the board of com-

missioners were erroneous, except in cases where there is a direct appeal from the judgment of the board. The question as to the regularity of the proceedings may not be litigated in a collateral attack, although the enquiry as to whether there was, or was not, jurisdiction may be. *Grusenmeyer* v. *City of Logansport*, 76 Ind. 549; *Bryan* v. *Moore*, 81 Ind. 9, auth. p. 13; *Board, etc.*, v. *Pressley*, 81 Ind. 361; *Caskey* v. *City of Greensburgh*, 78 Ind. 233; *Ricketts* v. *Spraker*, 77 Ind. 371; *Houk* v. *Barthold*, 73 Ind. 21. The only question that we can consider is whether the board of commissioners had jurisdiction to make the order annexing to the town of Cicero the territory described in the pleadings. If there was no jurisdiction, the appeal must fail; if there was, it must be sustained.

Whether the land annexed by order of the board was, or was not, contiguous to the corporate limits, was a question of fact for the decision of the board of commissioners. *Grusenmeyer* v. *City of Logansport, supra*; *City of Indianapolis* v. *McAvoy*, 86 Ind. 587. Whether a particular parcel or parcels of land immediately adjoin the limits of a town or city, can only be determined from the evidence in the particular case, and is, therefore, a question of fact.

Injunctions never lie to restrain the enforcement of the decision of a judicial tribunal of competent jurisdiction upon questions of fact.

Where a petition is presented to a board of commissioners, sufficient in form and substance to invoke its jurisdiction in a matter where it has general jurisdiction of the subject-matter, its judgment declaring the petition sufficient can not be collaterally attacked, although the petition may have been bad. *Mullikin* v. *City of Bloomington*, 72 Ind. 161; *Stoddard* v. *Johnson*, 75 Ind. 20; *Muncey* v. *Joest*, 74 Ind. 409; *Argo* v. *Barthand*, 80 Ind. 63; *Coolman* v. *Fleming*, 82 Ind. 117.

The failure of petitioners, invoking the assistance of an inferior judicial tribunal, to aver in their petitions all such facts as the statute declares such a petition shall contain, does not invalidate the proceedings where there are allegations

sufficient to show that the tribunal has a general jurisdiction over the subject-matter. *Coolman* v. *Fleming*, *supra*; *Corey* v. *Swagger*, 74 Ind. 211. If the petition shows a case falling within the general subject-matter over which the tribunal has jurisdiction, then the judgment of that tribunal, asserting jurisdiction in the particular case, will be respected as against all collateral attacks, no matter how defective or imperfect the petition may be.

Where a petition, authenticated by the signatures of the town officers, and professing to be the petition of the town is filed with the board of commissioners, is adjudged sufficient, and judgment is entered annexing the contiguous territory, it will conclude taxpayers from raising, in a collateral attack, any questions as to the formality of the proceedings by the town trustees. Such questions are necessarily decided by the board of commissioners, and are, therefore, so conclusively adjudicated as not to be brought into consideration by a collateral attack. *Catterlin* v. *City of Frankfort*, 87 Ind. 45.

It is settled by a long line of decisions that the failure to name the land-owners affected by proceedings, such as these, can not be made the basis of a successful attack, except, perhaps, in cases of appeal. *Little* v. *Thompson*, 24 Ind. 146; *Hedrick* v. *Hedrick*, 55 Ind. 78; *Wild* v. *Deig*, 43 Ind. 455 (13 Am. R. 399); *Miller* v. *Porter*, 71 Ind. 521; *Porter* v. *Stout*, 73 Ind. 3; *Featherston* v. *Small*, 77 Ind. 143; *Heagy* v. *Black*, 90 Ind. 534.

Where notice is required before an inferior tribunal can act, and it does act, it is not essential that its record should show that it expressly adjudged the notice sufficient. The action does this by implication and is enough to express the decision. *Board, etc.*, v. *Hall*, 70 Ind. 469.

The notice, as the complaint shows, was published five weeks successively; the first publication was on the 5th day of May, 1871, and the last on the 2d day of June following, and on the 5th day of that month the board of commissioners having, as it is shown, examined the petition and accompa-

nying plat, directed that the territory be annexed as prayed. We think the notice was sufficient, so far as publication is concerned, for five weeks had elapsed from the time of the first publication to the rendition of the judgment. *Catterlin* v. *City of Frankfort*, *supra*. The statute, however, provides that copies of the notice shall be served upon persons who are residents of the county (R. S. 1881, sec. 3389), and the complaint avers that notice was only given by publication, and it is also alleged that the plaintiffs were residents of the county, and so known to the town officers. In our opinion these plaintiffs were entitled to notice as provided in the statute, and as the proceedings affected them personally, and as they had private rights affecting individual property, separate and distinct from their interests in common with other citizens and taxpayers, the proceedings, so far as they affected their individual interests, were unauthorized and invalid. There is a plain distinction between proceedings affecting persons in common with other citizens, and proceedings which directly affect their private rights as owners of property, and in the latter case, where the law provides that they shall have notice, they are entitled to it, and if none is served upon them there is no jurisdiction over the person. In the present instance, the board of commissioners, according to the allegations of the complaint, did not have jurisdiction of the person of these appellees, who were then resident citizens, and known to the appellant to be such, and the judgment was, according to the statements of the complaint, without validity. *Cavanaugh* v. *Smith*, 84 Ind. 380; *Packard* v. *Mendenhall*, 42 Ind. 598; *Horner* v. *Doe*, 1 Ind. 130; *Mitchell* v. *Gray*, 18 Ind. 123; *Willman* v. *Willman*, 57 Ind. 500. It would be strange indeed, if a resident of the State, entitled to notice by express provision of law, should be concluded in cases where no notice at all was given him. If this were so, then a man might lose important rights without having had his day in court, and this is contrary to fundamental principles.

This is not a case, taking the averments of the complaint as true, where there was some notice, although irregular and defective, and it is not within the cases which hold that where there is a notice, although defective, the judgment is not void. *Muncey* v. *Joest*, 74 Ind. 409; *Hume* v. *Conduitt*, 76 Ind. 598; *McAlpine* v. *Sweetser*, 76 Ind. 78; *Stout* v. *Woods*, 79 Ind. 108; *Oppenheim* v. *Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Cavanaugh* v. *Smith, supra; Kyle* v. *Kyle*, 55 Ind. 387; *Hawkins* v. *Hawkins*, 28 Ind. 66; *McCormack* v. *First National Bank*, 53 Ind. 466. The case as made by the complaint falls within the rule that a judgment void for want of jurisdiction of the person may be collaterally attacked.

We say that there was no notice to known resident property owners because the publication is notice only to unknown or non-resident owners. It does not, as is plainly evident from a reading of the statute, operate upon residents who are known to the town authorities. The complaint must be held good for the reason that it affirmatively shows that there was no jurisdiction of the person, and that there was nothing in the commissioners' record concluding the appellees from asserting that there was no such notice.

The evidence, however, shows that notice was served. It is true that it appears that the original notices were lost, but this does not change the rule. The appellees have so long slept upon their rights that their claim should be viewed with disfavor, and no very high degree of evidence should be required to bind them by the judgment in which they have so long acquiesced. It is perhaps doubtful, whether notice was served on one of the appellees, but as she unites in this action, and as her interest can not be severed, her case must fall with those with whom she has inseparably blended her interests.

We do not find it necessary to decide whether the long and unexplained delay does or does not preclude a successful attack upon the proceedings. It may well be that the appellees should be held to have lost their rights upon this ground,

but as the question has not been discussed by counsel we give no opinion upon it. We refer, however, to the case of *Earle* v. *Earle, ante*, p. 27.

Judgment reversed.

Filed Nov. 27, 1883.

No. 11,250.

## MAY *v.* RICE, AUDITOR.

91 546
127 208

CONSTITUTIONAL LAW.—*Legislative Appropriations.*—The Constitution prohibits the drawing of money from the State except in pursuance of appropriations made by law.

SAME.—*Enactment of Laws.*—The Constitution requires that laws shall be enacted by bill, and that the style shall be, "Be it enacted by the General Assembly of the State of Indiana."

SAME.—*Auditor of State.*—*Joint Resolution.*—Money can not be appropriated by joint resolution, nor can the Auditor of State issue a warrant for money so appropriated.

From the Superior Court of Marion County.

*T. A. Hendricks*, for appellant.

*F. T. Hord*, Attorney General, for appellee.

ZOLLARS, J.—This is a proceeding by mandamus instituted by the appellant to compel James H. Rice, as Auditor of State, to issue to her a warrant upon the State Treasurer for $10,000. The judgment below was in favor of the auditor. At the session of 1883 the General Assembly passed the following, denominated a joint resolution, viz.:

"A joint resolution, providing for the payment of a claim in favor of Mrs. Edwin May, and appropriating money therefor.

"*Be it Resolved by the General Assembly of the State of Indiana.*

"SECTION 1. There is hereby allowed Mrs. Sarah May, wife of the late Edwin May, for services of said Edwin May as architect in the construction of the State House, now in

process of erection, the sum of ten thousand ($10,000) dollars, and said amount is hereby appropriated out of any money in the treasury not otherwise appropriated.

"SEC. 2. The Auditor of State is hereby authorized to draw his warrant on the State Treasurer for said amount."

This resolution was signed by the presiding officer of each House, and at the proper time was presented to the Governor for his approval. The Governor did not approve and sign it, nor did he return it, with his objections, to the Legislature, but caused it to be filed in the office of the Secretary of State. It appears now among the published laws of the session. Acts 1883, p. 211.

In June, 1883, Mrs. May requested and demanded of the Auditor of State a warrant upon the treasury for the amount named in the resolution. The Auditor, believing that the resolution does not confer upon him the legal right to draw such warrant, declined to comply with the demand. Whether it does or not is the question for decision. The Constitution provides that the Auditor of State shall perform such duties as may be enjoined by law. Section 151, R. S. 1881.

Section 5639 of the statute provides, *inter alia*, as follows: "The Auditor of State shall, at no time, draw a warrant upon the Treasurer of State unless there be money in the treasury belonging to the fund upon which the same is drawn to pay the same, and in conformity to appropriations made by law, and on money actually in the treasury, subject to the payment of the same." Another section makes the Auditor criminally liable for drawing a warrant in violation of the above section. It is very clear, then, that the Auditor has no authority to draw such warrant unless there has been an appropriation made by law. The Constitution further provides as follows: "No money shall be drawn from the treasury but in pursuance of appropriations made by law." Section 195, R. S. 1881. And further, as follows: "The style of every law shall be: 'Be it enacted by the General Assembly of the State of Indiana'; and no law shall be enacted, except

by bill." Section 97, R. S. 1881. Does the so-called resolution so meet these several requirements of the Constitution as to make a valid appropriation of the $10,000? It has neither the title nor style of a law, as required by the above constitutional provisions. It was not, *eo nomine*, enacted as a "bill." In name and form it purports to be a joint resolution, and not a bill or "act" of the Legislature. It must be treated as a resolution, and not as a bill. This suggests three inquiries:

1st. Is it essential, to constitute a law, in the sense in which that term is used in the Constitution, that the enactment shall have been presented and passed as a bill?

2d. Is it essential, in the enactment of a law, that the words prescribed for the enacting clause shall be used, or may the words "Be it resolved" be substituted for "Be it enacted"? Out of these enquiries springs the more general one:

3d. Is this resolution a law, in any sense, as that term is used in these sections of the Constitution and statutes, in relation to the appropriation of money and the drawing of warrants upon the treasurer by the auditor of State?

One purpose of the framers of the Constitution, and of the people in its adoption, we think, is patent, and that was to guard the treasury against extravagant, unjust, and hastily and carelessly allowed demands. It was the same purpose as led the House of Commons to adopt the standing order that, before a bill for the expenditure of public money should be introduced, the subject-matter should be first considered in committee of the whole, and the bill be ordered by that committee. Cushing's Law and Practice of Legislative Assemblies, section 2079. It was a kindred purpose to this, which led to the practice in the English Parliament, that all bills for the imposition of public burdens, by way of raising revenue, shall originate in the House of Commons, and which led to the incorporation into the constitution of the United States, and of most of the States, that such bills shall originate in that branch of the Legislature nearest the peo-

ple. Cushing, section 2303; May Parliamentary Prac., pp. 437, 447; R. S. 1881, sections 7, 113.

Is a resolution a bill? Perhaps as accurate a definition of a bill as can be found is that given in Webster's Dictionary: "A form or draft of a law, presented to a Legislature, but not yet enacted, or before it is enacted; a proposed or projected law." "In some cases statutes are called bills; but usually they are qualified by some description; as, a bill of attainder." Bills and acts are sometimes used as synonymous terms. Cushing, section 2055. The definition of a bill as given by Webster is that usually accepted and acted upon, but, as we shall see, our Constitution extends it. The idea conveyed by the word *bill* is different from that conveyed by the word *resolution*. The distinction between a bill and resolution is clearly kept up in the Constitution of this State, as an examination of some of its provisions will show. We call attention to some of the sections of article 4: Bills may originate in either house, except revenue bills. Section 17. The vote on the passage of a bill, *or* joint resolution, shall be taken by yeas and nays. The bill must be read by sections on three different days, etc. Section 18. A joint resolution, of different sections, doubtless may be passed upon one reading. Every *act* shall embrace but one subject, and matters properly connected therewith, which subject shall be embraced in the title. Section 19. There is no such provision in relation to joint resolutions. No *act* shall ever be revised or amended by mere reference to its title. Section 21. This section has no reference to joint resolutions. No "act" shall take effect until the same shall have been published and circulated in the several counties of the State by authority, except in cases of emergency, etc. Section 28. This can have no reference to joint resolutions. They take effect as soon as passed. Bills and joint resolutions must be passed by a vote of a majority of the members of the Legislature, and, when so passed, shall be signed by the presiding officers of the respective houses. These requisites they have in common, but the distinction is

clearly kept up. Section 25. In section 14, of article 5, a bill is recognized as still a bill, after its passage, and until it has reached the Governor. Every bill which has passed, etc., shall be presented to the Governor. The Governor is required to either sign the bill, or return it to the house in which it may have originated, with his objections, etc. If he sign the bill, it becomes a law. If he veto it, and it is not repassed by the requisite vote, it does not become a law. Nothing of the kind is required in relation to a joint resolution under our Constitution, as we understand and interpret that instrument. Such a resolution, if passed by the requisite vote, and signed by the presiding officers, is in full force. Nothing would be added to its validity and force by the signature of the Governor, nor has he any power to defeat it by a veto. It does not go to him for any purpose of approval or disapproval. It appears from the Constitutional Debates that a proposition to include joint resolutions with bills in the above section, so that they should be sent to the Governor, was voted down. 2 Debates Const. Con., p. 1331. This action of the convention is the more significant when we recollect that the convention was in a work of reform, adapting the new Constitution to the increased wants and dangers of a rapidly increasing and progressive population, and that the Constitution of 1816, which was being superseded, provided that joint resolutions as well as bills, should be sent to the Governor for his approval or disapproval, and to be treated by him and the Legislature as bills if vetoed by him. It is very apparent from this examination of the Constitution that the terms *bill* and *joint resolution*, as used therein, do not mean the same thing. They are widely different. Their functions are altogether different. Authority to act by joint resolution is given, affirmatively, by the Constitution in but few instances.

By such resolution, the two houses may adjourn for more than three days. Article 4, section 10. Certain officers may be removed by such resolution. Article 6, section 7. Possibly, under section 17, of article 5, the powers granted to

grant pardons, etc., may be exercised by such resolution. Besides the authority thus expressly granted, a joint resolution doubtless may be the means of expressing the legislative will in reference to the discharge of an administrative duty if such expression falls short of the enactment of a law. The general and most common use of resolutions is in the adoption of rules and orders relative to the proceedings of the legislative body. Cushing, *supra*, section 779; May's Par. Prac., pp. 440, 447, 450. Our conclusion upon this branch of the case is, that a joint resolution under our Constitution is not a bill, and that laws for the appropriation of money for public purposes, or the payment of private claims, such as Mrs. May's, can not be enacted by joint resolution. This view is sustained by the cases of *Barry* v. *Viall*, 12 R. I. 18; *Reynolds* v. *Blue*, 47 Ala. 711; *Brown* v. *Fleischner*, 4 Oregon, 132; *Boyers* v. *Crane*, 1 W. Va. 176. In the case last cited the court says: "By article 4, section 1, Constitution of West Virginia, the legislative power is vested in the Senate and House of Delegates, and the style of their acts is required to be, 'Be it enacted,' etc. Now the joint resolution which forbids the auditor to pay the secretary the residue of his salary subsequent to July 1st, 1863, and which attempts to set off the amount so withheld, against the amount previously paid him, for the quarter preceding, is in conflict with all these provisions of the organic law and is therefore void."

Mr. Cushing says that "A form of legislation, which is in frequent use in this country, chiefly for administrative purposes of a local or temporary character, sometimes for private purposes only, is variously known, in our legislative assemblies, as a joint resolution, a resolution, or a resolve. This form of legislation is recognized in most of our constitutions, in which, and in the rules and orders of our legislative bodies, is put upon the same footing, and made subject to the same regulations, with bills properly so called. In Congress, a joint resolution, which is the name given in that body to this kind of legislation, is there regarded as a bill." Sec. 2403.

We are not prepared to gainsay this, but it does not serve as authority for such legislation under our Constitution. The Constitution of the United States requires that joint resolutions as well as bills shall be submitted to the President for his approval or disapproval. Article 1, section 7. It will be found that generally, if not universally, like provisions are contained in the Constitutions of the States, where such legislation has been sanctioned.

There is no inhibition against such legislation, that we have been able to find, in the Constitution of the United States. The same may be said of some of the States.

If, in the case in hearing, it shall be held that the money was appropriated by the resolution, it would follow, of course, that all similar appropriations may be so made, and that specific appropriation bills may be dispensed with; and if these, why not the general appropriation bills? and if this may be done, why may not the Legislature, by such resolution, repeal all of the laws making general and specific appropriations? Why may it not, by such resolution, repeal the whole body of the laws now in force? It would hardly do to grant all this. We are aware that there is a distinction recognized between laws general in their operation and application, and laws which affect but a few; but this distinction can hardly be made applicable when the public money is to be appropriated. At least, the distinction would be that between public and private bills. If the resolution may take the place of or be treated as a private bill, there seems to be no good reason why it may not take the place of and be treated as a public bill. Another anomaly would result from holding that the appropriation could be made by the resolution. For two claims of the same class, but due to different individuals, the Legislature might make two appropriations; to one by bill, to the other by joint resolution. The resolution needs no further action, and the party in whose favor the appropriation is made draws his money. The bill goes to the Governor, he declines to sign it, and returns it to the Legis-

lature with his objections. The objections appear satisfactory; the Legislature does not pass the bill over the veto, and the claimant named therein loses his claim. The section of the Constitution, as we have seen, requires that "The style of every law shall be: 'Be it enacted by the General Assembly of the State of Indiana.'" The Constitution of 1816 did not contain the provision, "and no law shall be enacted except by bill"; neither did it contain the word "every" in the section prescribing the enacting clause. It was as follows: "The style of the laws of this State shall be, 'Be it enacted by the General Assembly of the State of Indiana.'" Under the Constitution of 1816, the argument that the provision prescribing the style of the laws was directory, and not mandatory, might have some plausibility and force; and as it was not provided in that Constitution, that "no law shall be enacted except by bill," it might, with the same plausibility, be said that money might be appropriated by joint resolution. With the present Constitution there seems to be no room for construction. In the one instance, there is a positive inhibition, and in the other, the word "every" implies a negative, which amounts to an inhibition. It is a cardinal rule of construction that statutory provisions will not be held to be directory, when they embody a prohibition, by the use of negative words. Cooley Const. Lim. (5th ed.) p. 89; Sedgwick Stat. Law (2d ed.), p. 319. For illustrations of mandatory acts, see Sedgwick Stat. Law (2d. ed.), p. 316, n. Applying this rule of construction to the section of the Constitution under examination, it must be held to be mandatory.

It has been held by some of the ablest courts and law writers, that the rules which distinguish directory and mandatory statutes should rarely be so applied to Constitutions as to hold their provisions directory. Judge Cooley holds to this doctrine, and criticises, with much force, the cases holding the contrary, some of them cases cited by counsel for appellant. Cooley Const. Lim. (5th ed.) p. 93. That author says:

"But the courts tread upon very dangerous ground when

they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. * * * * * * * * There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application."

After referring to the cases, he says further: "These cases, and especially what is said by the California court, bring forcibly before our minds a fact, which can not be kept out of view in considering this subject, and which has a very important bearing upon the precise point which these decisions cover. The fact is this: that whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the Legislature as if it was devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory, seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And if the Legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law, so great as that which is done by the habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed." Cooley, *supra*, p. 180.

This court in a recent case said: "The Constitution says that 'the style of every law shall be, Be it enacted,' etc., and doubtless this clause should precede everything which is made and declared to be law." *Barton* v. *McWhinney*, 85 Ind. 481, 487. It would be extending this opinion to an undue length, to examine each case cited by counsel. We may, however, say of the case of *Swann* v. *Buck*, 40 Miss. 268, that it arose under a Constitution like that of 1816 in this State, and the decision was made to turn upon the fact that "There are no exclusive words in the Constitution negativing the use of any other language." Our Constitution does contain words of exclusion, and these words overthrow the above case, as authority here. In addition to this, Mississippi is one of the States in which resolutions, as well as bills, go to the Governor.

When the language of a Constitution is obscure, or there is doubt as to the scope or application of any provision, construction becomes necessary. In the interpretation of constitutions, as well as statutes, the object is to ascertain and carry out the purpose of the authors. In doing this, the words used in the instrument should be taken in their literal signification, unless, by giving them such signification, the meaning of the instrument is rendered doubtful, or it is made to lead to possible oppression or injustice, or to contradictions or absurd results. In this case, the language of the Constitution is so plain and emphatic, that we need not enquire for reasons in its adoption. In such a case, our duty is a plain one, to declare and uphold the Constitution. If we may hold the section under discussion to be directory, it seems to us, that to be consistent, we would be compelled to make a like ruling as to every other section of the Constitution.

In reaching the conclusion we have in this case, we have not been unmindful of the rule so forcibly urged by appellant's counsel, that very great respect should be had for the judgment of the Legislature, as a co-ordinate branch of the

government, in the passage of the resolution. It is a rule well settled, that the courts should not overthrow an enactment as unconstitutional except in the clearest case, and that all doubts should be solved in favor of the legislative action. Nor have we been unmindful of the force that should be given to legislative practice which may serve as a legislative interpretation. It is a fact, that, under the Constitution of 1816, money was, in several instances, appropriated by joint resolutions for the payment of private claims. Under the present Constitution, like appropriations have been made, but much less frequent. If the sections under examination were at all ambiguous, or doubtful in meaning, or if there were serious difficulties in the way of literal interpretation and practical application, such examples of legislative action would be of very much more weight. But, under a section so plain and unambiguous, such examples by the Legislature amount to nothing more than occasional violations and call for judicial disapprobation, rather than serve as interpretations.

These appropriations have not been frequent. The settled course of the Legislature has been to make all such appropriations by specific appropriation bills, and especially since the adoption of the new Constitution, which contains inhibitions not in that of 1816. In the shortness of the sessions, and the mass of business that presses upon the members, it is not to be wondered at that there are occasional oversights and mistakes upon questions of constitutional law. In what we have said and decided in this case, we have not brought ourselves in conflict with the case of *Willets* v. *Ridgway*, 9 Ind. 367, cited by counsel.

We need not notice the case of *State* v. *Bailey*, 16 Ind. 46, further than to say that so far as it was necessary to decide, and so far as anything was really decided, in that case, we do not regard it as in conflict with the conclusion reached in this case. Our conclusion being that the resolution is not a law, it results that the appropriation in favor of Mrs. May was not legally made, the Auditor of State had no authority to

draw his warrant upon the treasurer therefor, and that the court below in so deciding decided correctly.

The judgment is therefore affirmed, with costs.

Filed Nov. 27, 1883.

---

No. 8234.

## CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY *v.* COBURN ET AL.

RAILROAD.—*Conveyance.—Condition Subsequent.—Right of Way.—Title.—Statute Construed.*—The 21st section of the charter of the Indianapolis and Bellefontaine Railroad Company does not give to a conveyance of the *right of way* upon a condition subsequent the effect of a conveyance of land in fee simple absolute.

SAME.—*Breach of Condition in Deed.—Consideration.—Abandonment.—Release.*—A conveyance to a railroad company of the right of way for its road, the consideration of which is shown to be the construction and permanent maintenance of the road upon the line so granted, and the erection and maintenance of its depot upon adjoining lands, is upon condition subsequent, and if such depot and track be afterwards abandoned, it is a breach of the condition, which defeats the grant. And if, upon such abandonment, the grantor, for a valuable consideration from the railroad company, grant the right of way to another person and release the company of all damages and rights of action by reason of the removal of the depot, no title to the land will be or remain in the railroad company.

From the Superior Court of Marion County.

*H. H. Poppleton, J. T. Dye* and *A. C. Harris*, for appellant.

*C. H. Test, J. Coburn, W. Wallace, T. A. Hendricks, A. W. Hendricks, C. Baker* and *O. B. Hord*, for appellees.

BICKNELL, C. C.—It is not disputed that the appellant holds all the rights of the Indianapolis and Bellefontaine Railroad Company to the land in controversy in this suit. All the defendants except Thomas A. Hendricks and wife, Aquilla Parker and Mrs. Lingenfelter, are the heirs at law of Henry P. Coburn. Hendricks and wife and Parker and Mrs. Lingenfelter claim under conveyances made by the Coburn heirs in 1859, 1861 and 1862.

The land in controversy is a strip eighty feet wide extending through out-block No. 182 in Marion county, Indiana. This out-block belonged to Henry P. Coburn, who subdivided it into lots, and, on March 9th, 1854, filed a plat thereof in the recorder's office of Marion county, on which the strip in controversy is named Curve street.

In 1866, on the petition of the Coburn heirs, Curve street was vacated by the common council of Indianapolis, except an alley twelve feet wide in the center thereof, between Ash and Plum streets. Afterwards some of the owners of the lots abutting on the vacated street enclosed parts of it. On the 17th of August, 1874, the appellant brought this suit, claiming to be the owner of said strip of land, and seeking to establish its boundaries, to quiet the title thereto, and to obtain possession of so much of it as was held adversely.

The appellant claims title as follows:

It holds the rights of the Indianapolis and Bellefontaine Railroad Company, which was chartered in 1848, to build a railroad from Indianapolis to the Ohio State line, near the site of Union City.

It was authorized to acquire, by relinquishment and by condemnation, lands and materials for the construction of its road. Its charter, in section 18, provides that "It shall be lawful for said company, either before or after the location of any section of said road, to obtain from the person or persons through whose land the same may pass a relinquishment of so much of the land as may be necessary for the construction or location of said road * * * * and that all such relinquishments * * * * made and entered into in writing, by any person or persons capable of contracting, made in consideration of such location or construction of said road, for the benefit of the company, shall be binding and obligatory; and said company may have their action at law or in chancery, in any court of competent jurisdiction, to compel the performance of the same."

In section 21 the charter provides that "when said com-

pany shall have procured the right of way as hereinbefore provided they shall be seized in fee simple of the right of said land, and shall have the sole use and occupation of the same, and no person * * * * shall in any way interfere therewith, or disturb, molest or injure any of the rights and privileges hereby granted, so as to detract from or affect the profits of said corporation."

The language of this section is somewhat obscure. The Legislature, in exercising the right of eminent domain, has the power to determine the estate or quantity of interest in the lands which shall be taken, whether an estate for years, for life, or in fee; whether a right of reversion in any event shall be left in the owner, or whether a mere easement shall be taken, without divesting the general ownership of the land. *Heyward* v. *Mayor*, 7 N. Y. 314; *Water Works Co.* v. *Burkhart*, 41 Ind. 364, 373.

But section 21, *supra*, does not expressly provide that the company shall be seized in fee simple of the land. The words are, "They shall be seized in fee simple of the *right* of said land, and shall have the sole use and occupation of the same, and no person shall interfere therewith."

In the absence of any judicial construction of this language, it might be supposed to mean that the company shall be the owner of the right relinquished, which might be a fee, or a less estate, or a mere easement, according to the terms of the written relinquishment. But the very same language, in another charter, has been construed by this court as follows: "We think it simply intended as declaratory of the effect which the releases and condemnations of land * should have; that is, whether they should be taken to convey an easement, a right of way merely, or a fee simple title, and declaring it should be the latter; that they should have the same force that deeds from the proprietors in the usual form to the company, conveying to their sole use, etc., would have." *Newcastle, etc., R. R. Co.* v. *Peru, etc., R. R. Co.*, 3 Ind. 464. Under this construction, an unconditional relinquishment of the land undoubtedly would

have vested in the railroad company the absolute fee simple of the land, but the statute under consideration can not be held to impair the right to make contracts. *Fisher* v. *Evansville, etc., R. R. Co.*, 7 Ind. 407; *Evansville, etc., R. R. Co.* v. *City of Evansville*, 15 Ind. 395.

The company is not bound to accept a conditional relinquishment; it may proceed to acquire the land by condemnation. If it does not proceed by condemnation, but accepts a relinquishment coupled with conditions, then, upon general principles, if the conditions are precedent, they must be performed before the rights of the company can be complete, and if the conditions are subsequent, a failure to perform the conditions may be followed by a forfeiture of the estate of the company, even if it be a fee simple. *Leach* v. *Leach*, 4 Ind. 628; *Lindsey* v. *Lindsey*, 45 Ind. 552, 562.

On the 27th of February, 1849, the plaintiff's road was located through the out-block No. 182, eighty feet in width, by an accurate survey. On the following day Henry P. Coburn executed to the railroad company the following deed of relinquishment:

"INDIANAPOLIS AND BELLEFONTAINE RAILROAD.

"RELEASE OF RIGHT OF WAY.

"I, Henry P. Coburn, of the county of Marion and State of Indiana, for and in consideration of the advantages which may or will result to the public in general, and myself in particular, by the construction of the Indianapolis and Bellefontaine Railroad, as now surveyed, or as the same may be finally located, and for the purpose of facilitating the construction and completion of said work, do hereby for myself, my heirs, executors, administrators and assigns, release, relinquish and forever quitclaim to the president and directors of the Indianapolis and Bellefontaine Railroad Company the right of way for so much of said railroad as may pass through the following described piece, parcel, or lot of land, to wit: Out-block No. 182, situated, lying and being in the county of Marion and State of Indiana, being part of the donation

lands for the seat of government for the State of Indiana. This release to cover eighty feet in width, or forty feet from the center of the road on each side. Said company shall make the necessary culverts under the track to pass the water, and I reserve the right to lay down and keep a railroad track in front of the lots adjoining the road, and also of connecting the same with the track of the railroad in such way and manner as shall be designated and approved by the board. And I hereby further release and relinquish to the president and directors of the Indianapolis and Bellefontaine Railroad Company, all damages and right of damages, actions and causes of actions whatever, which I might sustain, or be entitled to by reason of anything connected with or consequent upon the location or construction of such work, or the repairing thereof when finally established and completed.

"Witness my hand and seal this 28th day of February, A. D. 1849. H. P. COBURN. [SEAL.]"

This deed was not recorded until August 14th, 1867, more than seventeen years after its acceptance by the company, but it was valid as between the parties thereto. The foregoing instrument is not an unconditional relinquishment of a right of way. The depot of the company at Indianapolis was to be erected on out-block No. 181, adjoining out-block No. 182, and the location of the track through the latter block approaching the proposed depot on block No. 181, and the acceptance by the company of the aforesaid relinquishment were parts of one transaction. Unquestionably, the intention of the parties was that the depot should be constructed and permanently maintained on out-block 181, and that the track upon out-block 182 was to be permanently maintained as an approach to the depot. The relinquishment states its consideration, to wit, advantages to the public in general and to the grantor in particular, by the construction of the railroad as now surveyed, that is, on the land relinquished; but without permanence there would be no advantages, and such per-

manence was the principal consideration. This appears clearly from the subsequent provisions, to wit, that the company shall make the necessary culverts under the track to pass the water, and that the grantor reserves the right to *lay* down and *keep* a railroad track on the ground relinquished in front of the lots adjoining the same, and also of connecting the same with the track of the railroad.

In the *Indianapolis, etc., R. W. Co.* v. *Hood*, 66 Ind. 580, it was held that where real estate is conveyed to a railroad company for and in consideration of the permanent location and construction of the depot of its railroad thereon, and such depot is constructed thereon, but is subsequently removed and located upon other land, the removal constitutes a breach of a condition subsequent, although the word "condition" be not used in the deed. The court cited *Cross* v. *Carson*, 8 Blackf. 138 (44 Am. Dec. 742); *Leach* v. *Leach*, *supra*; *Leach* v. *Leach*, 10 Ind. 271; *Scott* v. *Stipe*, 12 Ind. 74, and *Clark* v. *Holton*, 57 Ind. 564. See, also, *Rawson* v. *Inhabitants*, 7 Allen, 125; *Horner* v. *Chicago, etc., R. W. Co.*, 38 Wis. 165; *Hunt* v. *Beeson*, 18 Ind. 380.

In determining the question whether the estate granted is one upon a condition subsequent, the court will seek to enforce the intention of the parties, to be gathered from the instrument and the existing facts. 4 Kent Com. 132; 2 Parsons Con. 499; Chitty Con. 74; *Horner* v. *Chicago, etc., R. W. Co.*, 38 Wis. 165, 174. We therefore think that the relinquishment in controversy created in the railroad company an estate upon condition subsequent, liable to be defeated upon the non-performance of the condition.

The relinquishment was dated February 28th, 1849. The railroad company built its track through out-block 182, and in 1851 or 1852 built its depot on five acres of ground in out-block 181, and in August, 1853, sold the five acres and the buildings thereon to Farnsworth, for the purpose of a car manufactory, and this conveyance included the right of way in common with said company over the tracks of the railroad across out-block 182.

On the 28th of February, 1854, Henry P. Coburn executed to the railroad company the following instruments:

"OLD DEPOT GROUNDS. WARRANT NO. 8033.

"Received, February 28th, 1854, from the Indianapolis and Bellefontaine Railroad Company the sum of nine hundred and fifty dollars for right of way to old depot grounds at Indianapolis, by check at twenty days.

(Signed) "H. P. COBURN."

"Whereas the president and directors of the Indianapolis and Bellefontaine Railroad Company formerly had a depot located on out-lot number 181 of the donation lands adjoining the city of Indianapolis, Marion county, Indiana, which they have removed; and whereas, to procure the location of said depot, I subscribed stock to said railroad company; and whereas, at the request of said railroad company, I have this day released to Joseph Farnsworth, Jr., the right of way over my out-lot in said city numbered one hundred and eighty-two; and whereas said $950 is paid to me by said railroad company: Now, in consideration of the premises, I release and relinquish to the president and directors of the Indianapolis and Bellefontaine Railroad Company all damages and right of damages, actions and causes of action whatever, which I might sustain or be entitled to by reason of anything connected with the removal of said depot, or by reason of my subscription and payment of said stock.

"Witness my hand and seal this 28th day of February, A. D. 1854. (Signed) H. P. COBURN. [SEAL]

"Witness, S. YANDES."

These instruments were executed a few days before Coburn filed his plat of out-block 182, on which the strip relinquished to the railroad company was named "Curve street." Coburn died intestate in July, 1854. The railroad tracks remained on the land relinquished to the company until 1862, when they were taken up by the company, who utterly abandoned the use of Curve street on or before December 1st, 1862.

On the 26th of July, 1862, the plaintiff had presented a

petition to the common council of Indianapolis making certain propositions, which were accepted by the city and acted upon by the parties. In that petition the plaintiff states that it is desirous of locating the track of its railroad on Railroad, Davidson, Ohio, Winston and New York streets, and will, if its prayer be granted, as soon as the new track is constructed and ready for use, abandon the use of our present route (from the proposed point of departure near Market street, through Railroad street and Massachusetts avenue, to the northeast corner of the city), and after removing the track, will surrender and convey to the city all the rights we have on the line of abandonment north of the north line of New York street.

At the time this proposition was made the strip of land in controversy was known as Curve street; Coburn's plat, with the lots laid out upon it abutting on Curve street, had been filed in 1854. The company's proposition was to remove its main track from Massachusetts avenue eastward so as to cut off all connection with Curve street, and the track on Curve street was taken up accordingly.

We think the facts showed a breach of the condition subsequent upon which the relinquishment was made.

The appellant claims that Coburn, by the receipt and release which he executed on February 28th, 1854, waived any right he may have had to take advantage of such breach. Its brief says: "On the face of the instruments themselves, we insist that it is shown beyond question that Mr. Coburn waived any and every supposed claim he could make against the railroad, and forever put at rest any possible dispute as to the ownership of the land."

The instruments, taken together, are parts of the same transaction; they bear the same date. The release specifies the right of way for which the money mentioned in the receipt was paid. The jury found in their answer to one of the interrogatories that there was no other consideration for the payment of the $950 than that expressed on the face of the receipt and release.

The receipt states that the $950 was paid by the company "for right of way to old depot grounds"; these depot grounds had been sold to Farnsworth for a car factory in 1853; the release shows that for $950 "I (Coburn) have this day released to Farnsworth the right of way over my out-lot in said city, numbered 182." If the plaintiff owned Curve street, which was the site of the right of way, it did not need to procure for its grantee, Farnsworth, the right of way from Coburn; but if its title had been legally determined under the condition subsequent, then it became necessary that it should procure from Coburn, for Farnsworth, the right of way over Curve street to the buildings which it had sold to Farnsworth on lot No. 181.

There is nothing in the receipt and release, taken together, which transfers any interest in the street from Coburn to the plaintiff, or which waives any right of Coburn's accruing upon the breach of the condition subsequent.

But the release asserts that the out-lot is now Coburn's, and this the plaintiff concedes by receiving the contract. Before the breach of the condition, the entire lot was not Coburn's; the eighty-foot strip, called Curve street, had been owned and occupied by the plaintiff. If, as the contract concedes, the lot was now Coburn's, then he had either made a formal entry for the forfeiture, of else his possession and title being recognized by the contract, it became unnecessary that he should perform a useless act by making a formal entry. *Thompson* v. *Thompson*, 9 Ind. 323, 329.

The release, after reciting that the plaintiff formerly had a depot on lot No. 181, which it had removed, and that Coburn had subscribed stock in order to procure the location of the depot, and that at the request of the company he had granted a right of way to Farnsworth for $950, paid by the company, proceeds thus: "Now, in consideration of the premises, I release and relinquish to the president and directors of the Indianapolis and Bellefontaine Railroad Company all damages and right of damages, actions and causes of action whatever,

which I might sustain or be entitled to by reason of anything connected with the removal of said depot, or by reason of my subscription and payment of said stock."

There was no recognition of any interest of the plaintiff in the real estate in controversy, no transfer of any interest therein, and no waiver of any right of Coburn in relation thereto; but there was a clear recognition by the execution and acceptance of the contract, that Coburn was the owner of the entire block No. 182.

The facts hereinbefore recited appear upon the record by undisputed evidence; they show that the plaintiff has no right to recover in this action, and that the finding for the defendants in the court below was right. In such a case, a judgment can not be reversed for an erroneous instruction, nor for any other error, where it appears to this court that the merits of the case have been fairly tried and determined in the court below. R. S. 1881, section 658, and see R. S. 1881, section 398. The superior court in general term did not err in affirming the judgment of the superior court in special term.

The judgment of the superior court in general term ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the superior court in general term be and the same is hereby in all things affirmed, at the costs of the appellant.

ELLIOTT, J., took no part in the decision of this cause.

Filed Nov. 28, 1883.

---

No. 9476.

91 566
166 231

## THE CITY OF PERU *v.* GLEASON.

CITY.—*Contract.*—*Legislative Power.*—*Drainage.*—The power of a city to drain lands within or without its corporate limits is a legislative power, to be exercised or not at discretion, and such discretion can not be surrendered by contract with the owners of such lands.

The City of Peru v. Gleason.

SAME.—*Violation of Agreement to Construct Drain.—Damages.*—Within and adjoining a city was a tract of swampy land, injurious to the public, for the purpose of draining which the city contracted with G., a proprietor of a part of the swamp outside of the city limits, and other separate owners of parts of it within and without, whereby the city agreed to make a ditch within its limits, to serve as an outlet, and each proprietor to continue the same through his own tract. This would have rendered the swamp valuable. The city was authorized also to make lateral drains through the lands of G. and the others to intersect the principal one. G. and the other proprietors performed their agreement, but the city failed, and G. brought suit for breach of the contract, claiming damages in consequence of the injury to, and diminution in value of, his lands resulting from the fact that the water could not pass away. *Held*, that the city was not liable for such damages.

From the Miami Circuit Court.

*J. M. Brown* and *N. O. Ross*, for appellant.

*R. P. Effinger*, —— *Cole*, *W. B. McClintic*, *B. Harrison*, *C. C. Hines* and *W. H. H. Miller*, for appellee.

BLACK, C.—The appellee sued the appellant. A demurrer to the complaint, assigning as causes want of sufficient facts and defect of parties plaintiffs and defendants, was overruled, and this ruling is the first alleged error assigned.

The facts shown by the complaint were, in substance, as follows:

On the 22d of June, 1867, the appellee was the owner of a tract of land embracing seventy-five acres, in Miami county, and he was still the owner thereof at the commencement of this suit. Adjoining said tract on the west, one Daniel R. Bearss owned a tract; next on the west, Dema L. Tyner owned a tract; and next on the west said Bearss owned another tract. All said lands adjoined the northern corporate limits of the city of Peru. Next east of the appellee's said tract one Ebenezer P. Loveland owned a certain tract, north of and adjoining out-lot No. 19 in Godfroy's addition to said city, which out-lot was owned by one James M. Stutesman. From said out-lot Benton street, one of the streets in the eastern portion of said city, extends southward through said city to the Wabash and Erie Canal, which runs from east to

west through said city. Said lands so owned adjoining the northern boundary of said city were of a low, wet, swampy and marshy character, a portion thereof being covered with stagnant water during the greater part of the year. A part of the territory of said city, lying adjacent to said low lands, was likewise low, wet, swampy and covered with stagnant water; and said low lands within the city and so adjoining it, in such condition, were highly prejudicial and injurious to the health and comfort of the inhabitants of said lands and of said city. The natural slope of a portion of the territory of the city, including its said low ground, is northward, and the only natural and convenient outlet for the surface drainage thereof is over and through said low lands on the north.

On said 22d of June, 1867, said Bearss, Tyner, the appellee, Loveland, and Stutesman and the appellant executed a contract, in writing, for the purpose of draining said lands outside of the city and said territory within the city, by a continuous ditch extending from a point on said most western tract thence eastwardly through said other tracts and said out-lot, and thence down Benton street, so as to conduct the water into the canal. Said contract, which was made an exhibit, was as follows:

"This memorandum of agreement, made this 22d day of June, 1867, by and between the common council of the city of Peru, Miami county, Indiana, in council assembled, of the first part, and James M. Stutesman, Ebenezer P. Loveland, Newell Gleason, Daniel R. Bearss and Dema L. Tyner, all of the county and State aforesaid, of the second part, witnesseth, that an agreement has this day been made and entered into by and between said parties to drain the wet ground lying in the north and northeast portions of said city, and the low lands of said parties of the second part, adjoining the limits of said city, by the deepening and enlarging the ditch now constructed on Benton street, in said city, from the Wabash and Erie Canal northwardly, and the continuation of said ditch from the northern terminus thereof, as here-

inafter provided, through the lands of said parties of the second part. For the purpose of effectually carrying out said agreement, the said party of the first part hereby agrees: *First.* To cut said ditch on said Benton street, along its entire length, about four feet deeper than it now is, of sufficient depth to insure the proper drainage of all the grounds herein contemplated, to a point on out-lot number nineteen, in the Godfroy addition to said city (said lot being now owned by said Stutesman, party hereto), where it shall intersect the natural channel of the water from the low lands aforesaid, and to slope the sides of said ditch at an angle of near thirty-three degrees, and of proper width on the bottom to effect the purpose herein contemplated; *Second.* The enlargement and deepening of said ditch on Benton street to be done at the expense of said city of Peru; the entire work of enlarging and deepening the same to be completed on or before the 1st day of August, 1867. And the said party of the second part agrees: *First.* To dig and construct a ditch corresponding in fall and proportionate in depth and dimensions with said ditch on Benton street, from the northern terminus of the same, angling through the out-lot of said Stutesman aforesaid, thence through the low lands of said Loveland, Gleason and Bearss, following as near as may be the natural channel of the water thereon, to a point on the Peru and Mexico turnpike road, at or near a small culvert or drain across the same, situated northwardly from the toll-house of said turnpike company, and thence westwardly through the low lands of said Tyner and Bearss to the summit,—on condition, and it is hereby understood by and between all the parties hereto, that each of the persons composing said party of the second part contracts for himself to dig and construct said ditch through his or her own lands, and neither of said persons shall be held liable for the failure of or violation of these agreements, or any part thereof, to said city, by any party other than himself or herself, it being understood that each of the parties of the second part is held liable as individuals to said city and to

each other. *Second.* Each of the persons composing said party of the second part binds himself, his heirs, executors, administrators or assigns, to grant a perpetual right to said party of the first part and their successors in office, to drain into said ditch at any point on his own land on the following terms and conditions, to wit: If the ditch for drainage as aforesaid shall be constructed along any street or highway leading or extending to said ditch herein contracted to be built, then the same may be left open; but if it shall run into said ditch through the private grounds of said parties of the second part, then it shall be sunk to such depth and covered so as not to interfere with the cultivation of the soil, provided that no ditch or drain shall be dug or so located as to interfere with or run under any building that may be situated on said lands; and provided, further, that the expense of digging, constructing and covering said ditches shall be paid by said parties of the first part. *Third.* That the expense of digging and constructing said ditch from its northern terminus on Benton street aforesaid, to the summit west of the Peru and Mexico turnpike, shall be paid by each of the parties composing said party of the second part through his own lands; and the said ditch shall be completed by the 1st of November, 1867; it being hereby agreed by all the parties of the second part that each will, in the order in which their lands lie with reference to said termination of the said ditch on Benton street, dig and complete their portion respectively in such proportionate period of time between the completion of the portion thereof by said city of Peru and the time above specified for its entire completion as the amount of work by them to be done shall compare with the whole amount to be done by said party of the second part, so as to enable all of the parties of the second part to complete said ditch by the time aforesaid. And it is further agreed by and between all of the parties hereto: *First.* That said ditch, along its entire length, shall be of uniform fall and proportionate width and depth, to be determined by the engineer of said city, and all of said

work to be done under his supervision and direction, provided that all proper expense attending such supervision and direction of so much of the same as is to be constructed by said parties of the second part shall be paid by them respectively. In witness whereof the said common council of the city of Peru has hereto affixed the corporate seal of said city and signed the same by the mayor thereof, and each of the other parties has hereunto set his hand and seal, the day and year first above written; and it is further agreed that the said parties of the second part shall keep the ditch through their premises free and open at all times, and that said parties of the first part shall also keep the ditch constructed by them free and open, so that the same, through its entire length, shall be in condition contemplated in its original construction for proper drainage."

It was alleged that said contract was entered into for the purpose of draining said outside lands and said territory within the city, and of benefiting, improving and protecting the health and comfort of the inhabitants of said lands and of said city; and that if said ditch had been constructed, extended, deepened and enlarged according to the stipulations of said contract, such purpose would have been attained. It was alleged that, at the proper time, the appellant began, and for a time said city prosecuted the work of enlarging said Benton street ditch; that the appellee and said other persons of the second part, relying on the covenants of the appellant, and being led by said acts of the appellant to believe that said city was about to perform said covenants and carry out the stipulations of said contract in good faith, entered upon, and in due time completed all the work to be by them, or either of them, performed under the terms of said contract, so that by the 1st of November, 1867, the appellee and said other persons of the second part had constructed, under the supervision of the engineer of said city, a continuous, open and unobstructed ditch from said summit on the land of said Bearss to said northern terminus of said Benton

street ditch, on said out-lot No. 19, complying in every respect with the provisions of said contract; that the appellee had performed all and singular the conditions of said contract stipulated to be performed on his part; that afterward the appellant abandoned the work of improving said Benton street ditch before it had been enlarged and deepened according to the terms of said contract; that the appellant had wholly failed to complete said work according to the terms of said contract; that the work performed by the appellant on said Benton street ditch was so unskilfully, improperly and insufficiently performed, that the banks of the same caved in; that the appellant permitted and still permits the same to become and remain obstructed, so as to prevent the flow of water through said ditch as stipulated in said contract; that by the fault and negligence, as above set forth, the flow of water from the lands of the appellee has been obstructed, and a large portion of said lands are thereby rendered worthless and unfit for cultivation, and the health of persons residing on and in the vicinity of said land is endangered and impaired, and the whole of said property is greatly diminished in value, to the damage of the appellee, in, etc.

It is argued by some of the learned counsel for the appellee, that while the ditch in question was a work to undertake or not to undertake which was within the discretion of the appellant, yet, having undertaken the work and having made a ditch, the city was bound to so construct and maintain it as not to injure others, and that the appellant is liable for injury occasioned to the appellee by the faulty construction of the ditch or the failure to keep it in proper condition. But this is not the case presented by the complaint. No part of the work done was undertaken or done by the city except the enlargement of the Benton street ditch; the remainder of the ditch made was undertaken and made by the appellee and the other land-owners. The Benton street ditch was an artificial watercourse, conducting water from the lands of the

appellee and others situated outside of the city limits into and through the city to the canal. The appellee had no right to have his lands so drained in the first instance or to have such drainage thereof continued, unless he acquired such right under the contract, and his land has not been injured by the faulty construction or maintenance of the ditch. Waters have not been accumulated by the Benton street ditch and discharged therefrom upon the land of the appellee; nor have waters, which but for the work done by the city upon the Benton street ditch would flow off, been set back upon his land because of the manner in which that ditch has been constructed and maintained. Before the making of the ditch, his land was low, wet and swampy and unfit for cultivation. It is not shown that the water now collected upon his land came there by any act or omission of the appellant, or that there is more water than before the work was done, or that the unhealthiness has increased, or that the land is less productive. It is merely shown that the appellant has not provided a ditch sufficient for the drainage of his land. The complaint is that the ditch made by the city does not carry off all the waters that accumulate on the appellee's land, and he has therefore not been benefited to the extent to which he claims to be entitled under the contract; that the appellant has made a ditch on Benton street, but that, in the manner of its construction and maintenance, it does not constitute a sufficient performance of the appellant's contract duty. The action is upon the contract.

We deem it unnecessary to particularly examine the provisions of the statute for the incorporation of cities, as to their powers in relation to the construction of drains. Whatever powers are there expressly granted, or are to be inferred from the general provisions of the law, are to be exercised for the good of the city. Let it be admitted, for the purposes of argument in this case, that the appellant had authority to cause the making of the ditch in question through

the lands of the outside proprietors, and to pay for the making of the ditch through such lands by assessment upon the owners thereof, or to agree with such owners for the making of the ditch by them at their own expense; also, to contract with such owners for the right of way over their lands for such drains as might be made in the future from the city into the ditch so made by said owners, and to agree that the city would make such drains from the city at its own expense, and that the city might contract with owners of outside lands, to pay them out of the general funds of the city, for the right of way over such lands of drains made on such lands for the benefit of the city; also, that the city had the power to construct and keep in repair the ditch on Benton street, either at the expense of adjoining owners, or to be paid for out of the general fund of the city.

In the contract before us, the city was not to pay said proprietors anything for making the ditch through their lands, or for any right of way. The appellee and other land-owners were to make the ditch through their lands at their own expense, and to grant right of way over their lands into said ditch for drains from the city, to be made by the city.

What was promised by the city was to enlarge and deepen the ditch along Benton street, so that it, with the ditch to be made by the land-owners, would drain said wet lands. The ditch outside the city was made as stipulated in the contract. The city had caused the Benton street ditch to be improved, but not in the manner contracted for, and it had not been kept in good repair; and because of the faulty construction and maintenance of the ditch on Benton street, the water was prevented from flowing through it as stipulated in the contract, and the flow of water from the appellee's land was thereby obstructed. To show damage, it was alleged that a large portion of the appellee's land was thereby rendered worthless and unfit for cultivation, and that the health of persons residing on and in the vicinity of said land was en-

dangered and impaired, and that the whole of said property was greatly diminished in value, to the damage of the appellee in a certain sum.

The city could not make a binding contract to construct and keep in repair a ditch on one of its streets merely for the purpose of reclaiming and rendering valuable to the owner a parcel of land beyond the city limits.

The common council of a city has a continuing legislative authority to do such acts, within the corporate powers, as may be needed for the preservation of the health, comfort and welfare of the inhabitants of the city. It can not by contract surrender the future exercise of this discretionary power. The powers of the municipal corporation over its streets are held by it in trust, to be exercised for the public benefit on all proper occasions. They can not by contract be abandoned or impaired for the benefit of private persons. If the appellant has the power to make a drain to carry off surface water from beyond the city, it is because it determines that it will be for the promotion of the healthfulness and welfare of the city to do so. No authority can in this matter control the discretion of the council or reverse such determination. If, having made such a ditch, it keep it in such repair that it will continue to carry off waters from outside lands, it must be presumed that it does so because it still considers it to be beneficial to the city to do so. If it abandon such a ditch, and if it remain in such a condition that it does not benefit lands beyond the city limits which before such abandonment were incidentally benefited thereby, can the city be liable for the amount in which the owner of such lands would have been benefited if the ditch within the city had been kept in such condition that it would have rendered his land productive and innocuous, on the ground that the city had contracted to keep the ditch in such condition?

Suppose that after the city had appropriated one of its streets for such a purpose, and the experiment had been tried,

it should be found or determined by the common council, composed as when the contract was made or of different members, that it was positively detrimental to the health of the city to permit the waters from a marsh outside the city to flow through the city, could it through such a contract be prevented from protecting the city by obstructing the flow of water, on the ground that this rendered such outside land less valuable to its owner?

Suppose that the ditch as made and maintained by the city on Benton street were regarded by the common council as being of such capacity as to drain such outside land sufficiently for the preservation of the health and comfort of the inhabitants of the city, and that such drainage as would make said land productive would be injurious to the health of the city, could the city, because of such contract and the failure to make the ditch as therein stipulated, be required to pay the appellee the amount in which he would be benefited by a thorough drainage of his land?

It is not charged that because of the failure of the appellant to perform the contract the health or welfare of the city is impaired; and if this were true, it would be no ground of complaint for an individual; there would then be a failure to perform a duty to the public, to properly exercise official discretion.

The determination whether such outside lands are, or continue to be, a nuisance and injurious to the city, is a matter for the legislative determination of the common council. It can not surrender this power reposed for the public welfare. It may, therefore, at any time refuse to provide for this drainage, except to a certain extent deemed to be sufficient, or refuse to provide for it to any extent. The canal may, at some time, be wholly abandoned as a water-way through said city and be filled up. Benton street, or some portion thereof, may be vacated. In many ways it may become beneficial or necessary to abandon the outlet on Benton street. If the contract

is valid and may be enforced against the appellant for the incidental injury to the appellee, then the city can not abandon the drain within the city, though the council should determine that it is not needed for the welfare of the city, or that it is positively injurious to the health of the people to maintain it. If such is the effect of the contract, it constitutes a bargaining away of a right of judgment given to the council, to be constantly exercised for the welfare of the city. Therefore, the stipulation on the part of the appellant to make and maintain the Benton street ditch can not be enforced. Dillon Mun. Corp. (3d ed.), section 97, and authorities there cited; *Cone* v. *City of Hartford*, 28 Conn. 363; *City of Atchison* v. *Challiss*, 9 Kan. 603; *Driftwoqd Valley Turnpike Co.* v. *Board, etc.*, 72 Ind. 226, 242; *City of Indianapolis* v. *Indianapolis Gas-Light and Coke Co.*, 66 Ind. 396.

The city received no money or property from the appellee. He dug the portion of the ditch allotted to him in the contract upon his own land. What was the amount of his expense, or what was the value of the labor performed by him, is not alleged. His execution of this work is alleged by way of showing performance of the contract on his part, and not by way of showing his damage, which is set forth as being the diminution in the value of his land.

The question whether the appellee could recover, in any form of action, the amount of his expense, or the value of labor bestowed upon the ditch on his land, is not before us, and we will not lengthen this opinion by discussing it.

The appellee must be presumed to have known, at all times, that while the appellant had power to make and maintain a ditch on Benton street, such as was described in the contract, that is, a legislative power to do that for the failure to do which he makes complaint, yet the common council could not bind the city, as a party to a contract with the appellee, to make and maintain such ditch; and that, there-

fore, the city was not, by said contract, placed under obligation to him to make and maintain said ditch on Benton street.

He can not recover on the contract for the failure of the appellant to make and maintain said ditch as stipulated.

The demurrer to the complaint, for want of sufficient facts, should have been sustained.

PER CURIAM.—It is ordered; upon the foregoing opinion, that the judgment be reversed, at the costs of the appellee.

HAMMOND, J., did not participate in the decision of this cause.

Filed Nov. 28, 1883.

No. 10,380.

## KEESLING *v.* WATSON, ADMINISTRATOR.

91 578
127 102
91 578
129 361

PROMISSORY NOTE.—*Execution.—Delivery.— Possession.— Complaint.*—In a complaint upon a promissory note alleged to have been executed by the defendant and to be in his possession, it is not necessary to also allege that he delivered the note.

SAME.—*Excuse for Failure to File Copy as Exhibit.—Fraud.*—In such case the averment that the defendant has possession of the note is a sufficient excuse for failing to file the note or a copy of it with the complaint; nor was it necessary to allege that one S., in whose custody the note was, and from whom it was alleged the defendant fraudulently procured the note, was the plaintiff's agent, as the *onus* of showing that the plaintiff had parted with the note was on the defendant.

SAME.—*Consideration.*—In a suit on a note, it is not necessary to aver a consideration as the note imports it.

SAME.—*Evidence.—Statements.—Res Gestæ.*—Where, in such case, the defendant obtained from S., who had the custody of such note, its possession by virtue of an order which purported to have been executed by the decedent, he can not prove by S. what he said to S. at the time he obtained the note, about the decedent having executed such order. These statements were not a part of the *res gestæ*, and as they were made by himself, they were inadmissible.

PRACTICE.—*Motion to Strike Out Pleadings.*—Overruling a motion to strike out a part of a pleading is not an available error.

SAME.—*Evidence.—Notes of Judge.—Record.*—The notes of the evidence made and signed by the judge and made a part of the record can not

supply the evidence, especially when it does not purport to be all the evidence, and in such case the record can not be deemed to contain the evidence.

From the Delaware Circuit Court.

*J. W. Ryan, J. S. Buckles* and *J. F. Sanders*, for appellant.
*W. Brotherton, R. S. Gregory* and *W. W. Orr*, for appellee.

BEST, C.—The appellee brought this action against the appellant. The complaint consisted of four paragraphs, to each of which a demurrer, for the want of facts, was overruled. A motion to strike out portions of the second paragraph was also overruled. An answer was filed, a trial had, a verdict returned, and over a motion for a new trial judgment was rendered for the appellee.

These rulings have been assigned as error.

The first three paragraphs of the complaint seem to be founded upon the same note. The first, after averring that the plaintiff was the duly appointed administrator of Coracy Keesling, deceased, alleges that the defendant, on the 23d day of June, 1877, made and executed to the decedent, then in life, his promissory note for $1,515, payable at the time of her death, with ten per cent. interest from maturity; that she died on the — day of August, 1880, and that the note remains unpaid; that the defendant has possession of the note or has destroyed it, and by reason thereof the plaintiff is unable to furnish a copy of it. It is also averred that the note was given for real estate, and the prayer is that the plaintiff may recover judgment for the amount of the note and interest, and that the same be declared a lien upon the real estate.

The second paragraph alleged the same facts as the first, and in addition thereto averred that the defendant, who was the decedent's son, fraudulently obtained possession of said note by presenting to C. E. Shipley, who then had its custody, a written order purporting to have been drawn by the decedent upon him, requesting him to deliver the note to the defendant, but which order was not drawn by her, and the pos-

session of the note was thus obtained without her knowledge or consent.

The third paragraph avers the same facts as are averred in the second, and, therefore, need not be noticed more particularly.

The first objection urged to the first paragraph of the complaint is that it is not expressly averred that the note was ever delivered by the appellant to the decedent. It is conceded that the averment that "the note was made and executed," is ordinarily sufficient, but it is insisted that since it appears that the note is in the possession of the maker, it must be averred that it was originally delivered. No authority supports the appellant in this position, and we can see no reason for such averment. The averment that the note was executed implies a delivery, and is equivalent to an express averment that the note was signed and delivered. *Ricketts* v. *Harvey*, 78 Ind. 152.

The next objection urged is that a sufficient excuse for the failure to file the note, or a copy, with the paragraph, as required by statute, is not shown. It is insisted that an averment that the defendant has possession of the note is not sufficient without also stating how he obtained it. We think otherwise. If the defendant has possession the plaintiff is supposed to be unable to furnish a copy, and this inability constitutes his excuse. If unable to furnish a copy, the excuse is the same, however possession was obtained. The rights that grow out of or depend upon such possession do not enter into this question. The excuse as alleged seems to us to be sufficient. 1 Works Pr., p. 282.

The paragraph in question was not insufficient for the reasons urged, and, therefore, this assignment of error can not be sustained.

The objection first above considered is also urged against the sufficiency of the second and third paragraphs of the complaint, and in connection therewith it is insisted that the paragraphs are bad, because it is not averred that C. E. Shipley held possession of the note for or as agent of the decedent.

This objection is not well taken. These paragraphs aver that the defendant executed the note, and that it was due and unpaid. This rendered the defendant *prima facie* liable upon the note. The possession of Shipley was not inconsistent with the decedent's rights to recover, and the plaintiff was not required to aver that he held it for her, or that she had not parted with the paper. If such was the fact, the onus of showing it was upon the appellant.

It is also urged that these paragraphs are bad because it is not averred that a deed was made or tendered before suit brought. This was unnecessary. The note was an absolute promise to pay money; it imported a sufficient consideration. If there was a failure or want of consideration the defendant must plead it.

These paragraphs were sufficient, and the demurrer properly overruled.

The court, upon appellant's motion, refused to strike out portions of the second paragraph of the complaint, and this ruling is assigned as error. Such ruling is not an available error in this court. *House* v. *McKinney*, 54 Ind. 240; *Halstead* v. *Board, etc.*, 56 Ind. 363.

The fourth paragraph of the complaint was founded upon the following instrument:

"For value received, each of us promise, on or before the 9th day of December, in each year hereafter, during the natural life of Coracy Keesling, to pay to the order of the said Coracy the sum of one hundred and twenty-five dollars, with interest on each instalment after maturity thereof at the rate of ten per cent., without relief from valuation laws, and attorneys' fees if suit be instituted on this agreement. And in case said Coracy shall die on any other day than that fixed above for such payment, then the amount due hereon for such year shall bear the same proportion to the sum of one hundred and twenty-five dollars that the time then elapsed since the preceding 9th day of December shall bear to one full year. This is signed by all of us to avoid a number of separate in-

struments, but is intended only as a separate contract on the part of each signer, and not the joint contract of all, and no one of the signers hereof is liable in any form for the promise of any of the others.

"Muncie, Indiana, Dec. 9th, 1871.

(Signed) "STEPHEN C. KEESLING.
"HENRY C. KEESLING."
And by six others.

The objection urged to this paragraph is that the consideration for the appellant's promise is not stated. This was unnecessary. The above instrument is a promissory note which imports a consideration, and in such case no such averment is necessary. *Leach* v. *Rhodes*, 49 Ind. 291; *Durland* v. *Pitcairn*, 51 Ind. 426. The demurrer to this paragraph was therefore properly overruled.

The motion for a new trial was based upon the ground that the verdict was contrary to the evidence; that new evidence had been discovered, and that the court erred in refusing to allow C. E. Shipley and the appellant to testify to statements made by the latter at the time he obtained possession of the note from the former.

The questions raised by the first and second causes for a new trial depend upon the evidence. The appellee insists that the evidence is not in the record, and an examination of it leads us to the same conclusion. The record recites that certain "notes of the evidence" are filed, and these are set out, signed by the judge, and made a part of the record, but it is nowhere stated that these notes are all, or indeed any part, of the evidence. Besides, it affirmatively appears that a part of the evidence is not embraced within these notes. As the evidence is not otherwise in the record, the record can not be deemed to contain it. *Railsback* v. *Greve*, 58 Ind. 72.

In the absence of the evidence, the first and second causes for a new trial do not present any question. *Hill* v. *Sutton*, 47 Ind. 592.

A bill of exceptions recites that the appellee produced C.

E. Shipley, by whom he proved that the decedent left the note in question in his custody for safe-keeping; that appellant came to him, and, as the results of a couple of interviews, he prepared for and delivered to appellant a written order, to be executed by the decedent, directing the witness to deliver the note to appellant; that afterwards the appellant produced the order, then signed, or which purported to be signed, by the decedent, and delivered it to him with several other notes, made by him, payable to the decedent, at different times long thereafter, all aggregating the amount of the note then held by the witness, whereupon he delivered said note to the appellant. After the witness had thus testified, the appellant, upon cross-examination, asked what he had said to the witness at the time of such exchange of notes, whether he did not request him to go with him to his mother and effect the exchange of the notes; whether he did not request him to send his partner; what he said to the witness in the conversations preceding the preparation of the order, etc. These inquiries, upon objection, were excluded, and this ruling is the third ground of the motion for a new trial. The appellee claims that the note was obtained from Mr. Shipley without the decedent's consent; while the appellant claims that his mother consented to give him more time to pay the debt, and to carry out this purpose agreed to accept the other notes for this one, and not only directed him to deliver such notes to Mr. Shipley, but executed the order, directing Mr. Shipley to deliver this note to him. The real dispute was whether the mother had consented to the exchange. Upon this issue it seems manifest to us that the appellant could not prove his own statements. He could not, upon cross-examination, because the appellee had not gone into them, and he could not, on his own behalf, because his statements did not bind the decedent.

Nor were they admissible as a part of the *res gestæ*, as the appellant contends. The mere act of obtaining possession of the note was not disputed, nor did it need explanation. The

disputed fact was the execution of the written order. This, if done, was done before and at a different place. What the appellant may have said could not possibly throw any light upon an act which had before that time occurred. This case does not, as it seems to us, fall within any exception to the rule that precludes a party from proving his own statements against another made in the absence of such other person. There was, therefore, no error in refusing the proffered testimony.

This disposes of all the questions in the record, and for the reasons given, we think, the judgment must be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed Nov. 28, 1883.

---

No. 10,782.

91 664
135 137
91 584
142 222

## SWAYNIE *v.* VESS.

EJECTMENT.—*Complaint.*—Section 1054, R. S. 1881, requires that a complaint in ejectment shall state that the plaintiff is entitled to possession of the premises, and that the defendant unlawfully keeps him out, but it is not necessary to use the exact words of the statute.

From the Superior Court of Tippecanoe county.

*W. H. Bryan, G. O. Behm* and *A. O. Behm,* for appellant.
*C. E. Lake* and *J. S. McMillen,* for appellee.

ZOLLARS, J.—Action by appellee as lessee, to reform a lease and recover the possession of the leased premises. Trial, and judgment for appellee. The only error assigned in this court is the overruling of the appellant's demurrer to the complaint. The only objections urged against the complaint are that it does not contain the averments, first, that the plaintiff is entitled to the possession of the premises, and, second, that the defendant unlawfully keeps him out of possession. Section 1054, R. S. 1881, which is the same as sec-

tion 595, code of 1852, provides that in an action of ejectment the plaintiff shall state in the complaint that he is entitled to the possession of the premises, the interest he claims therein, and that the defendant unlawfully keeps him out of possession, etc. The provisions of this section must be complied with to render the complaint good as against a demurrer, but it is not necessary to use the exact words of the statute. It will be sufficient if words of similar import are used, or the averments of the complaint be such as to show the plaintiff's right to such possession, and the defendant's unlawful detention. *Knight* v. *McDonald*, 37 Ind. 463; *Smith* v. *Kyler*, 74 Ind. 575; *Lovely* v. *Speisshoffer*, 85 Ind. 454; *Vance* v. *Schroyer*, 82 Ind. 114.

The case of *Vance* v. *Schroyer*, 77 Ind. 501, recognized the doctrine of the above cases and the rule we have announced in this case, and is not authority for appellant's position.

It appears by the averments of the complaint, that appellant, as the owner of certain land, leased it to appellee in January, 1882, by a written lease, for a term of five years from the first day of November, 1882. Under a stipulation of the lease appellee had the right, and was allowed, to sow sixteen acres of wheat in September of that year. On the 1st day of November appellee complied with the provisions of the lease, tendered the rental, and demanded the possession of the land. Appellant refused the money, and refused to surrender possession of the premises to the plaintiff, and informed him that she would not then or thereafter abide by, and perform, the conditions of the lease. She still holds possession of the leased premises, and refuses to surrender the same to appellee. These averments clearly and sufficiently show appellee's interest in the premises; that he is entitled to the possession thereof, and that the defendant, appellant, unlawfully kept, and still keeps, him out of such possession. In addition to this the complaint makes a good case for a reformation of the lease, as to the description of the leased premises. Such being the case, it may well be said that the com-

plaint would be sufficient to withstand the demurrer, admitting the defects urged by appellant. *Lovely* v. *Speisshoffer*, 85 Ind. 454.

Discovering no error in the record, the judgment is affirmed, with costs.

Filed Nov. 27, 1883.

---

No. 10,897.

## WALLACE ET AL. *v.* ROWLEY, ADMINISTRATOR.

91 586
196 203

MARRIED WOMAN.—*Contract.*—*Promissory Note.*—Under the act of 1879, Acts 1879, p. 160, the promissory note of a married woman, given for money borrowed to carry on a business in which she was engaged on her own account, was valid.

PAYMENT.—*Promissory Note.*—*Former Adjudication.*—*Decedents' Estates.*—In a suit by an administrator upon a note, it was pleaded and proved that the defendant had filed a larger claim against the estate, giving credit thereon for the money which was the consideration of the note, and recovered the balance of the claim, after deducting the credit, there having been no question as to the credit either by pleading or proof.

*Held*, that this constituted a payment of the note.

From the Fulton Circuit Court.

*I. Conner*, for appellants.

*M. L. Essick* and *G. W. Holman*, for appellee.

BICKNELL, C. C.—The appellee, as administrator, brought this suit against the appellants, upon a note and mortgage given to his decedent; the note was signed by Elmira M. Wallace only, the mortgage was executed by both the appellants; the complaint demanded a personal judgment against Elmira and a foreclosure as to both defendants.

The defendant Robert Wallace answered the complaint by a general denial; the defendant Elmira answered in two paragraphs:

1st. That at the time of the execution of the note she was the wife of Robert Wallace, who is yet alive.

2d. That she prosecuted to judgment in said court, at No-

vember term, 1882, a suit against the plaintiff in this suit, and that one of the items of credit adjudicated in said cause was the same claim now prosecuted in this suit.

The plaintiff replied to said Elmira's answer in two paragraphs:

1st. A general denial of the entire answer.

2d. A special reply to the first paragraph of the answer, admitting the coverture as alleged and averring that when the note was executed, said Elmira was carrying on trade and business on her sole and separate account, to wit, keeping a hotel, and also selling goods, in Fulton county, Indiana, and that the money for which said note was given, was lent to her to be used in and about her said separate trade and business.

The defendant Elmira demurred to said second paragraph of reply for want of facts sufficient, and her demurrer was overruled.

Upon the issues thus joined the cause was tried by the court, who, at the request of the defendants, made a special finding and stated conclusions of law thereon, to wit:

1. Daniel Jones died intestate on December 13th, 1881, and the plaintiff is his duly qualified administrator.

2. On December 17th, 1879, the defendant Elmira M. Wallace was, and long before had been, and still is, the wife of her co-defendant Robert Wallace, and owned in her own right a hotel in said county, known as the Wallace House, which she kept and conducted npon her own sole and separate account.

3. That she borrowed from said Daniel Jones, on and before December 17th, 1879, several sums of money, in all $215, for which she gave the note in suit, said borrowed money being the sole consideration for said note.

4. That to secure said note she and her said husband executed the mortgage mentioned in the complaint, the property therein described being the separate property of said Elmira.

5. That after the decease of said Jones said Elmira filed a claim against his estate, comprising charges amounting to $386.40, with a credit as follows: Cash, December, 1879,

$215, interest one year $17.20, which left a balance due her of $154.20, which she claimed; and that on December 4th, 1882, she recovered upon said claim a judgment against the plaintiff as administrator of said Jones, for said $154.20, and that said credit, so entered upon said account, was the principal of the note now in suit, and the interest then due; that there was no contention or controversy on the trial of said claim as to said item of credit, but the only contention was concerning the balance demanded, to wit, $154.20, and no reference was made to said credit in said action, either in the pleadings or proof, except as aforesaid.

6. The money so borrowed was borrowed for the purpose following: One hundred and fifteen dollars was to be used by said Elmira in and about her said separate business of hotel keeping, and was so used; one hundred dollars thereof was borrowed by said Elmira to be used, and was used, to pay the premium or premiums due from her upon a policy of insurance upon her own life theretofore issued to her, which policy, in the event of her death, was payable to, and was made and procured for the use and benefit of, her said husband Robert Wallace.

"And as a conclusion of law upon the foregoing facts the court finds that the plaintiff ought to recover of and from the defendant Elmira the sum of $144.38, being the amount of said note, deducting said $100 borrowed and used for the payment of said premium upon said life policy, and that the mortgage is forfeited, and ought to be foreclosed and said land sold as against both of said defendants for the payment of that sum, the interest thereon and the costs of this proceeding."

The defendant Elmira excepted to the conclusions of law. Judgment was rendered for the plaintiff pursuant to the conclusions of law. The defendants appealed. The errors assigned are:

1. Overruling the defendant Elmira's demurrer to the sec-

ond paragraph of the plaintiff's reply to the first paragraph of her answer.

2. The court erred in its conclusions of law.

The first question presented is was the note of a married woman valid under the legislation of 1879, if given in the course of her separate trade and business, for money borrowed to be used, and actually used, in carrying on such separate business? The appellants claim that, notwithstanding the provisions of the act of 1879, Acts 1879, p. 160, by which this case is governed, the note of a married woman was absolutely void, and never became valid until it was made so by the legislation of 1881, R. S. 1881, section 5115, which abolished almost all the disabilities of married women.

The provisions of the act of 1879 aforesaid, which affect the question under consideration, are as follows:

"Sec. 2. A married woman may carry on any trade or business, * on her sole and separate account. The earnings and profits of any married woman accruing from her trade, business, services or labor, other than labor for her husband or family, shall be her sole and separate property.

"Sec. 3. A married woman may enter into any contract in reference to her separate personal estate, trade, business, labor or service, * the same as if she were *sole*," etc.

"Sec. 8. A husband shall not be liable for any debts contracted by the wife in carrying on any trade, labor or business on her sole and separate account."

Under the foregoing provisions, a woman might have carried on any business on her sole and separate account; she might have entered into any contract in reference to such business; she might have contracted debts in such business for which she would have been personally liable.

The provisions under consideration include the power to borrow money to be used in such separate business, and to promise to repay it by a valid promissory note.

The court, therefore, did not err in overruling the defend-

ant Elmira's demurrer to the second of the plaintiff's reply to the first paragraph of said Elmira's answer. But the court did err in its conclusions of law upon the special findings.

The second paragraph of the defendant Elmira's answer alleged, in substance, that in a former action by her against the present plaintiff as administrator of said Jones, she had given him a credit for the same claim, which is the cause of action in the present suit. The reply to this answer was the general denial. The special finding states that said Elmira had brought such a suit on a claim for $386, upon which were the following credits:

Cash, December, 1879 . . . . . $215.00
Interest one year . . . . . 17.20

And that in said suit she recovered a judgment for $154.20, the difference between the claim and the credit.

The appellee claims that the former suit can not be regarded as an adjudication of any matter now in controversy, because in the former suit the credit was for cash and interest, and the present suit is upon a note.

The special findings, however, show that the note in suit was given for cash—borrowed money; the amount credited was the amount of the note and interest; the court finds that "said credit, so entered upon said account, was the principal of the note now in suit, and the interest then due." The note, therefore, was paid; the present plaintiff received in the former suit the same money he claims in this suit, and it makes no difference that there was no contention or controversy in the former suit about the credit. It being found that the plaintiff in the former suit offered a credit for the amount of the note and interest, and that the defendant in the former suit received the credit, and that judgment was rendered accordingly, the second paragraph of the defendant Elmira's answer in the present was substantially proved, and the conclusion of law should have been that the plaintiff take nothing by his suit.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellee, and this cause is remanded, with instructions below to state a conclusion of law in accordance with this opinion.

Filed Nov. 28, 1883.

---

No. 10,579.

## ROZELL *v.* CITY OF ANDERSON.

91 591
139 207
91 591
140 365
91 591
148 94
91 591
153 477

MUNICIPAL CORPORATION.—*Street Improvement.—Sewers.—Errors in Judgment.—Liability to Lot-Owner.*—Where, in the improvement of a public street, a municipal corporation constructs a sewer in a skilful and careful manner, and keeps the same in good repair, it will not be liable in damages, as a general rule, to the owner of an abutting lot, for the errors in judgment or mistakes of the municipal authorities in regard to the capacity of the sewer to perform the work for which it was intended.

JURY.—*View of Property.—Evidence.—Supreme Court.*—Whether or not the trial court has made a proper order for the view of property, which is the subject of litigation in any case, under the provisions of section 538, R. S. 1881, is a question the Supreme Court can neither consider nor decide when the evidence is not in the record.

SUPREME COURT.—*Transcript.—Refusal of Instruction.—Statute Construed.*—The *proviso* in section 650, R. S. 1881, is only serviceable or advantageous when a party desires to present to the Supreme Court an alleged error of the trial court, in its refusal to give instructions at his request.

From the Madison Circuit Court.

*C. L. Henry* and *H. C. Ryan*, for appellant.

*M. S. Robinson* and *J. W. Lovett*, for appellee.

HOWK, C. J.—Melvina T. Rozell, the plaintiff below, averred in her complaint in this action, that she was the owner of a certain lot in the city of Anderson, and occupied and had located on such lot a tan-house, tan and other vats, tan-bark mill, steam engine and boiler, and all the fixtures and machinery necessary for carrying on a tan-yard and manufacturing leather; and she sought to recover of the appellee, the city of Anderson, the alleged damages to her property,

occasioned by an overflow of water upon such property by reason of the unskilful and negligent construction by the city of certain streets and culverts, and the unskilful and negligent putting in and maintaining by the city of insufficient and inadequate sewerage, and permitting the same to become and remain out of repair, and filled up and obstructed.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below, and over the appellant's motion for a new trial, the court rendered judgment in accordance with the verdict.

A number of errors are assigned by the appellant in this court; but her counsel say, in argument, that they "only desire to press upon the consideration of this court the second error assigned, to wit, the overruling of appellant's motion for a new trial." Under this alleged error, the appellant's counsel first directed our attention to two instructions, which the court gave the jury at appellee's request, and which counsel claim "are clearly contrary to the recognized law of Indiana, as laid down in repeated decisions of this court." These two instructions read as follows:

"*First.* Municipal corporations are not liable to individuals for judicial errors, although private rights may be injured thereby. Nor are such corporations liable to individuals for the exercise of their ordinary powers, however mistaken their policy may be, and although private injury may result therefrom.

"*Second.* If, therefore, you find that the streets, culverts and sewers complained of were made and constructed under and by order of the common council of said city, and that they were made in accordance with such order of said common council, in a skilful and careful manner, and were kept in repair by said city, then the plaintiff can not recover in her action, although said sewer and culverts were not of a sufficient capacity to perform the work for which they were intended, and although the improvement of said streets increased

the flow of water over plaintiff's lot, and caused the injury, if any were caused, complained of."

Before considering these instructions, it may be premised that the evidence given in the cause is not in the record; but in the bill of exceptions, containing the instructions given, the court has certified that each and all of the instructions, so given to the jury, "were applicable to the evidence in the cause."

Section 650, R. S. 1881, provides what shall be deemed parts of the record, and what may be made parts of the record by a bill of exceptions, or an order of court, upon an appeal from the judgment below to this court. The body of the section is almost a literal copy of section 559 of the civil code of 1852, and has been the subject of judicial construction for the past thirty years. But the proviso in section 650 is new, and first became a part of the civil code in 1881. This proviso reads as follows:

"*Provided*, That when in any case an appeal is prosecuted upon the question of the correctness of instructions given or refused, or the modifications thereof, it shall not be necessary to set out in the record all the evidence given in the cause, but it shall be sufficient in the bill of exceptions to set out the instructions or modifications excepted to, with a recital of the fact that the same were applicable to the evidence in the cause."

Where, as in this case, the instructions complained of were given by the court, but little is gained by the appellant, so far as we can see, by the statement in the bill of exceptions that the instructions were applicable to the evidence in the cause. Because, in the absence of the evidence, this court would presume, in support of the action of the trial court, that the instructions given were applicable to the evidence in the cause, without any statement to that effect in the bill of exceptions. It is only where the refusal of instructions is complained of as error, that such a statement, in the bill of

exceptions, might be of practical service. "It has long been settled that if under any supposable state of the evidence that could have been adduced under the issues, the evidence not being in the record, the instructions could have been correct, it will be presumed that that state did exist." *Miller* v. *Voss*, 40 Ind. 307. This rule is not abrogated or changed by the proviso in section 650, above quoted. *Drinkout* v. *Eagle Machine Works*, 90 Ind. 423.

Did the court err in giving the jury the two instructions complained of by the appellant, or either of them? We are of opinion that this question ought to be, and must be, answered in the negative. The first instruction quoted is copied almost *verbatim* from the opinion of this court in *Roll* v. *City of Indianapolis*, 52 Ind. 547. Briefly stated, the jury were told by this instruction that the city of Anderson was not liable to the appellant for the errors in judgment, or mistakes in policy, of the city authorities, although injuries or damages had resulted therefrom to her property. The second instruction quoted is dependent upon, and must be read in connection with, the first instruction, as it was read to the jury. Thus read, the two instructions state the law fairly and correctly, as applicable to what, as we may well suppose, was shown by the evidence. If the jury found that the sewer had been constructed in a skilful and careful manner, and kept in repair, the city would not be liable because of an error in judgment, or mistake of the city authorities, in regard to the capacity of the sewer to perform the work for which it was intended. This is substantially what the jury was told in the instructions complained of, and this is the law. *Weis* v. *City of Madison*, 75 Ind. 241 (39 Am. R. 135); *Cummins* v. *City of Seymour*, 79 Ind. 491 (41 Am. R. 618); *City of Evansville* v. *Decker*, 84 Ind. 325 (43 Am. R. 86).

The only other point discussed by appellant's counsel arises under the sixth cause for a new trial, as follows: Error of the court on the trial in permitting and directing the

jury to view the premises whereon the plaintiff's tan yard was situate, and refusing, at plaintiff's request, to permit the jury to view the entire line and route of the sewer, and in confining the view of the jury, when ordered, to the plaintiff's premises.

In section 538, R. S. 1881, it is provided that the court may order that the jury may have a view of real or personal property, the subject of litigation, or of the place in which any material fact occurred, whenever, in the opinion of the court, such view is proper. Whether or not the court made the proper order for the view in this case is a question we can neither consider nor decide in the absence of the evidence, and the evidence is not in the record.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed Nov. 26, 1883.

---

No. 10,697.

## PRUITT *v.* PRUITT ET AL.

| | |
|---|---|
| 91 | 595 |
| 138 | 223 |
| 91 | 595 |
| 140 | 215 |
| 140 | 465 |
| 91 | 595 |
| 149 | 428 |
| 149 | 430 |

DEED.—*Contract.—Rescission.—Lien for Purchase-Money.—Notice.—Executed Gift.—Infant.—Acceptance.*—A mother by deed conveyed lands to a son specifying therein that the consideration was natural love and affection and the sum of $300, to be paid by the grantee to another son J., an infant, when he became twenty-one years of age, "which the grantee hereby obligates himself to do." As evidence of his acceptance of the deed, and his obligation to pay as recited, the grantee also signed and acknowledged the deed, and had it properly recorded. J., on reaching his majority, sued upon the contract, making the grantee and N. and I. defendants, averring in his complaint the foregoing facts, a breach of the contract, that the grantee was a non-resident with no personal property in this State, and that N. and I. became owners of the land by purchase afterwards.

*Held*, that the complaint was good against each defendant—against the grantee for a personal judgment, and against N. and I. to enforce a lien for purchase-money, of the non-payment of which the recorded deed was, to them, constructive notice.

*Held*, also, that an answer by N. and I., that the contract was rescinded by the parties thereto while the plaintiff was an infant, and before he had knowledge of it, and the land reconveyed to the mother, from whom N. and I. afterwards purchased, paying full value, without actual notice of the plaintiff's claim, and that no valuable consideration moved from him, was bad on demurrer.

From the Bartholomew Circuit Court.

*F. T. Hord* and *W. B. Hord*, for appellant.

*G. W. Cooper*, for appellees.

HAMMOND, J.—This was an action by the appellant against the appellees to enforce a lien alleged to exist upon real estate in favor of the appellant, by virtue of a conveyance from Nancy Pruitt to the appellee Alexander Pruitt.

The complaint alleges that Nancy Pruitt, who was the mother of the appellant and the appellee Alexander, being the owner of the real estate in controversy, conveyed the same to said Alexander by warranty deed on the 12th day of November, 1860.

The deed, after the description of the real estate, contains the following provision respecting the payment of the purchase-money: "The consideration to be paid for said tracts of land is this, to wit: That said Alexander Pruitt is my son, and in consideration of the affection I bear him, and the further consideration that the said Alexander Pruitt is to pay to my son Joseph Thomas Pruitt the sum of $300 when the said Joseph Thomas arrives at the age of twenty-one years, which the said Alexander Pruitt hereby obligates himself to do, and that said Nancy Pruitt is to have the possession, use and benefit of the said tracts of land so long as she shall live, free of any charge, rent or other obligation whatever."

The appellee Alexander Pruitt accepted said deed, and, as an evidence of his acceptance thereof and his agreement to pay the appellant the sum specified at the time named, signed his name to said deed and joined with the grantor in the acknowledgment of its execution. He also caused said deed to be duly recorded.

At the time of said conveyance, the appellant, to whom the purchase-money was to be paid, was only five years of age. He attained his majority October 9th, 1876. Nancy Pruitt died in 1874. The appellees Nevitt and Isenogle became the owners of the land by purchase after the conveyance to said Alexander. At the time of bringing this action said Alexander was, and had been for a number of years prior thereto, a non-resident of the State, and had no personal property in the State. The complaint averred that the amount to be paid the appellant by the terms of the deed, with interest after his majority, was due and unpaid.

The appellees demurred jointly and severally to the complaint, for want of sufficient facts. These demurrers were overruled and proper exceptions saved.

As they have assigned as cross errors the overruling of these demurrers, they will be noticed before proceeding to the consideration of the errors assigned by the appellant. No objection to the complaint is urged in behalf of the appellee Pruitt. As to the other appellees, two objections are made against the complaint: *First.* That it does not aver that said appellees were the owners of the land at the time of bringing the action; and, *Second.* That no demand before suit is alleged. These objections are not well taken. The complaint avers that the appellees Nevitt and Isenogle became the owners of the land by purchase after the conveyance from Nancy to Alexander Pruitt. The contrary not appearing, the presumption would be that their ownership still continued. The complaint, as to them, only authorized a judgment *in rem.* If they had ceased to own the land, no judgment could be rendered that would harm them.

No demand before suit is necessary where the time for payment is fixed in the contract. *Frazee* v. *McChord*, 1 Ind. 224; *Ferguson* v. *State, ex rel.*, 90 Ind. 38. The contract embraced in the deed, upon which the appellant predicates his action, provides for the payment of $300 to him on his arriving at the

age of twenty-one years. Thus the time of payment was fixed. It was ascertainable by inquiry, and no demand was necessary. The provision in the deed that the grantee should pay the appellant the sum named, and the acceptance of the deed by the grantee, made the latter personally liable for its payment. This sum being the unpaid purchase-money of the land became a lien thereon in favor of the appellant. 1 Jones Mort., sections 205 and 214. The record of the deed showing that the purchase-money was unpaid, and that it was payable to the appellant, was constructive notice to the appellees Nevitt and Isenogle, as subsequent grantees. *Croskey* v. *Chapman*, 26 Ind. 333; *Sample* v. *Cochran*, 84 Ind. 594.

The complaint stated a good cause of action against the appellees, and there was no error in overruling their demurrers thereto.

The appellees Nevitt and Isenogle answered in four paragraphs, the last being the general denial. The appellee Pruitt answered in one paragraph. The appellant demurred to the first, second and third paragraphs of the answer of Nevitt and Isenogle and also to the answer of Pruitt. These demurrers were overruled. A reply was then filed. Trial by the court; finding for the appellees, and judgment on the finding, over the appellant's motion for a new trial. The assignment of errors challenges the correctness of the overruling of the demurrers to the special answers, and the overruling of the motion for a new trial.

The facts stated in all the special paragraphs of the answer were to the same effect, and substantially as follows:

When Nancy Pruitt made the conveyance to Alexander Pruitt the appellant was only five years of age. The agreement to pay the appellant $300 was not founded upon any valuable consideration moving from him. On September 11th, 1867, before the appellant had any knowledge of the provision made in the deed in his behalf, said Nancy and Alexander, by mutual agreement, rescinded their said con-

tract, and in consideration of the said sum of $300 which Alexander was to pay to the appellant, he reconveyed by warranty deed said real estate to said Nancy, which she accepted in full payment of said sum, and released said Alexander from his agreement to pay the same to the appellant. The answers of Nevitt and Isenogle also aver that after the reconveyance by Alexander to Nancy they purchased the real estate of the latter, paying her full value therefor, without any actual notice of the appellant's claim.

The question is, whether, under the facts stated, Nancy's attempted release of Alexander from the payment of the sum, stipulated in his deed from her to be paid to the appellant, had the effect intended.

The delivery of the deed to Alexander, containing the provision for paying the purchase-money to the appellant, became, as to Mrs. Pruitt, an executed gift of Alexander's promise to pay the purchase-money to the appellant. The placing of the deed upon record operated in favor of the appellant as well as the grantee. From the beneficial character of the provision for the appellant, an acceptance may be presumed. In the case of a minor, no formal acceptance of a gift is required to make it binding. The law implies an acceptance even though the infant be ignorant of the gift. It becomes binding and irrevocable as soon as it passes from the control and dominion of the donor. *Stewart* v. *Weed*, 11 Ind. 92; *Rinker* v. *Rinker*, 20 Ind. 185; *Wyble* v. *McPheters*, 52 Ind. 393; *Baker* v. *Williams*, 34 Ind. 547; *Williams* v. *Walton*, 8 Yerger, 387 (29 Am. Dec. 122); *Minor* v. *Rogers*, 40 Conn. 512 (16 Am. R. 69); *Kerrigan* v. *Rautigan*, 43 Conn. 17.

In *Howard* v. *Windham County Savings Bank*, 40 Vt. 597, one Almira Goodell deposited of her own money $200 in a bank in the name of her niece, Adaline F. Brown, a married woman, who died without knowledge of the deposit. Almira Goodell afterward died, and the deposit-book was found among

her effects. It was held that the money was so transferred and delivered by the deposit as to place it beyond the control of the donor, and that the gift was perfected.

It is well established law that when a gift is consummated it is irrevocable except by the consent of the donee. Our conclusion is that in the case before us the gift was executed, and that it was, therefore, beyond the power of Mrs. Pruitt to discharge her son Alexander from the payment of the debt.

Two decisions of this court strongly support the validity of the appellant's claim. The first to which we refer is *Mallett* v. *Page*, 8 Ind. 364. In that case a father directed his son to execute two notes for $125 each to his infant daughter, and to secure the same by mortgage on real estate which the father promised to convey to the son. The notes and mortgage were accordingly executed and made payable to the daughter, and delivered to the father to be kept until he should execute the deed to the son. The mortgage was placed on record. The father and son afterward changed their minds. The father entered satisfaction of the mortgage of record, and the contract between the father and son was regarded as rescinded. The daughter married, and in a suit by her and her husband on the notes and mortgage, it was held that they were entitled to recover. It was said in that case: "We are of opinion that the notes and mortgage should be sustained. It may be very true that the father changed his mind; but it does not thence follow that the rules of law should be accommodated to his change of opinion." It is true that case is criticised in *West* v. *Cavins*, 74 Ind. 265, but the criticism itself is authority in favor of the appellant in the case at bar. Speaking of the decision in *Mallett* v. *Page*, *supra*, this court, in *West* v. *Cavins*, *supra*, said:

"If the father had made a binding contract with the son to convey the land, and in consideration of that contract the son had executed the note and mortgage, the transaction would have been entirely valid and binding on all the parties, and

the conclusion of the court on the whole case clearly right." The condition, which it is said would have made the decision in that case right, existed in the case before us. Here the mother made the contract with her son, binding by an actual conveyance to him of the land, in consideration of which he promised, by the acceptance of the deed, to pay the appellant the sum sued for. When this was done, and when the deed containing the agreement to the appellant was placed on record, this act itself amounting to a *prima facie* delivery of the contract to the appellant, then the matter passed beyond the control of the mother, and the subsequent attempt by her and Alexander to rescind the contract did not affect the appellant.

The other case to which we refer is *Henderson* v. *McDonald*, 84 Ind. 149. In that case Mary Pray, being the owner of certain real estate, joined with her husband in a deed of the same to their son Leander. At the same time Leander entered into a written contract with his parents, securing the same by mortgage on the real estate conveyed to him, to the effect that, in consideration of the conveyance, he would support and pay them $50 a year each during their natural lives, and, also, that in one year after the death of both, he would pay his sister Mary, afterward married to Henderson, the sum of $700. Leander performed his contract with respect to his parents. His father died in 1866. After his death Leander's mother, for a valuable consideration, satisfied the mortgage of record. Leander, after this, conveyed the land for value to McDonald. The mother died in 1876. When the mortgage was executed the parents were not, in any way, indebted to their daughter Mary. Before the release of the mortgage Mary had notice that some provision had been made by her parents to pay her $700, and she executed to one Hopkins, a power of attorney, authorizing him to collect it for her. More than a year after the death of her mother Mary brought suit against McDonald to set aside the satisfaction of the mortgage, and for its foreclosure. This court decided in her

favor, saying: "The provision, having been made upon a good and upon an executed consideration, was irrevocable by the parties who made it. Consequently, the so-called release of the mortgage, entered on the record of it by Mary Pray, did not release the mortgagors from the payment of the money secured by it to the plaintiff, nor discharge the lien created by the mortgage in favor of the plaintiff. The provision made for the plaintiff by her parents was neither a gift *inter vivos*, nor a donation *mortis causa*, but was a settlement of a portion of her mother's estate upon her, somewhat in the nature of a bequest, and in such a beneficial way as to require no express acceptance on her part. The acceptance of such a provision will be presumed, in the absence of evidence of a refusal to accept it."

We are of the opinion that the special paragraphs of the appellees' answers, setting up the attempted cancellation of the agreement between Mrs. Pruitt and the appellee Alexander, did not state facts sufficient to constitute any defence to the appellant's action. The demurrers to such answers should have been sustained.

As the judgment will have to be reversed, other alleged errors need not be considered.

Judgment reversed, at the appellees' costs, with instructions to the court below to grant the appellant a new trial, to sustain his demurrers to the first, second and third paragraphs of the answer of Nevitt and Isenogle, and to the answer of Pruitt, and for further proceedings in accordance with this opinion.

Filed Dec. 11, 1883.

# INDEX.


ACCEPTANCE.

See CONTRACT, 4 to 6; DEED, 7.

ADMINISTRATOR.

See DECEDENTS' ESTATES; PAYMENT, 2.

AFFIDAVIT.

See BILL OF EXCEPTIONS, 5; PRACTICE, 2.

AFFIDAVIT AND INFORMATION.

See CRIMINAL LAW, 5.

AGENT.

See CONTRACT, 3; DEED, 6; EVIDENCE, 8, 9.

AGREEMENT.

See ATTORNEY AND CLIENT; CITY, 5; COMMON CARRIER; CONTRACT; DEED, 1; MORTGAGE, 2, 3; STATUTE OF FRAUDS; TOWN, 2, 3; TRUST AND TRUSTEE.

AMENDMENT.

See BILL OF EXCEPTIONS, 4; PLEADING, 3; PRACTICE, 2; SUPREME COURT, 12.

AMOUNT OF RECOVERY.

See NEW TRIAL, 3.

ANTENUPTIAL CONTRACT.

See TRUST AND TRUSTEE.

APPEAL.

See CRIMINAL LAW, 6, 7; DECEDENTS' ESTATES, 3, 9; HIGHWAY, 4; SUPREME COURT.

ARREST OF JUDGMENT.

See HIGHWAY, 5.

ASSIGNMENT OF ERROR.

See BASTARDY, 3.

1. *Pleading.--Estoppel.*—Where the court erroneously sustains a demurrer to the reply to a single paragraph of the answer, and the defendant thereafter offers to withdraw such paragraph, but the court, at the instance of the plaintiff, refuses to allow such withdrawal, the plaintiff will not thereafter be allowed to assign error upon such ruling.
*Conley* v. *Dibber*, *413*

2. An assignment of error based upon one ground can not be supported by another. *Patterson* v. *State*, *364*

ASSIGNOR AND ASSIGNEE.

See PROMISSORY NOTE, 4 to 9, 11; VENDOR AND VENDEE, 2.

## ATTACHMENT.

See ATTORNEY AND CLIENT, 3; EXECUTION, 3, 4.

## ATTORNEY AND CLIENT.

1. *Contract.—Receipt.*—A writing acknowledging the receipt of a claim "for collection" is a contract to collect, and if given by one not an attorney, who at the time represents himself as such, it imposes on him the duty and liability of an attorney. *Foulks* v. *Falls*, 315

2. *Same.—Evidence.*—Where a receipt of a claim for collection is not signed by the party as an attorney, in an action thereon for failure to collect, parol evidence is admissible to show in what capacity the defendant received the claim, but not to vary the terms of the receipt. *Ib.*

3. *Same.—Attachment, Duty as to.*—It is not the duty of an attorney to make the affidavit or execute the bond in attachment, even when instructed to attach; nor should the practice of so doing be encouraged, and there is no liability for failing to do so. *Ib.*

4. *Same.—Statute of Limitations.*—A suit to enforce the liability of an attorney upon one not an attorney, who agrees in writing to collect a claim, upon the ground that he orally represented himself to be an attorney, is not upon a contract partly by parol, and is not barred by the limitation of six years. *Ib.*

## AUDITOR OF COUNTY.

See COUNTY LIBRARY; SCHOOL FUND MORTGAGE; RAILROAD, 5; VENDOR AND VENDEE, 4.

## AUDITOR OF STATE.

See CONSTITUTIONAL LAW, 3.

## BANK.

See PROMISSORY NOTE, 2.

## BANK CHECK.

See PAYMENT, 1.

## BANKRUPTCY.

*Discharge.—Judgment.—Injunction.*—A discharge in bankruptcy does not affect the judgment of a State court, rendered against the defendant, in an action pending at the time of the adjudication, but rendered after he was adjudged a bankrupt (the pendency of the proceedings in bankruptcy not being interposed), and its collection can not be enjoined. *Bowen* v. *Eichel*, 22

## BASTARDY.

1. *Evidence.—Paternity of Child.*—The defendant in a bastardy proceeding may ask the relatrix whether she has had sexual connection with others about the time the child was begotten, and when the relatrix testifies that she had connection with him at several different times within four or five days of each other, about a certain time, and a fully developed child is born in less than nine months thereafter, the court should not limit the time within which such enquiry may be made to two weeks preceding the time she thinks the child was begotten. *Benham* v. *State, ex rel.*, 82

2. *Escape of Defendant.—Re-Arrest.*—Where a defendant in a bastardy case has been arrested and escapes, and the case certified to the circuit court, the defendant may thereafter be arrested though more than four years have elapsed since the institution of the proceedings before the justice. *Patterson* v. *State, ex rel.*, 364

3. *Same.—Assignment of Error.—Judgment.—Justice of the Peace.—Jurisdiction.*—Where the relatrix in such case makes application to the circuit

court for a warrant for the arrest of the defendant, and the defendant on appeal assigns as error that the court had no jurisdiction, because it appears upon the face of the application that the proceedings were instituted more than two years after the birth of the child, such assignment can not be supported by insisting that the court had no jurisdiction, because the justice did not adjudge him to be the father of the child. An assignment of error based on one ground can not be supported by another. *Ib.*

## BILL OF EXCEPTIONS.

See CRIMINAL LAW, 9; SUPREME COURT, 5.

1. *Record.*—Interrogatories filed with a pleading, but struck out by the court, are out of the record for all purposes until brought in by bill of exceptions or proper order. *Helm* v. *First Nat'l Bank, 44*

2. *Same.*—That time was given for the preparation of a bill of exceptions must appear by the record, otherwise than in the bill itself, else the bill filed during vacation will not be available. *Jones* v. *Jones, 72*
*Jones* v. *Jones, 475*

3. *New Trial.—Evidence.*—Under the code of 1852, where a motion for a new trial was overruled at a term subsequent to that of the trial, and time was then given for a bill of exceptions, questions as to the admissibility of evidence made at the trial could not be saved by the bill. *Mullaney* v. *Indiana Nat'l Bank, 77*

4. *Amendment of.—Record.—Rule of Court.*—A bill of exceptions may be amended to correct an error therein, by order of court, after the term at which it has been signed and filed, if there be a record, memorial or minute of the transaction, of equal or prior date, upon which the amendment can be based, as where the date of the adoption of a rule of court appears of record, but is erroneously stated in the bill. *Morgan* v. *Hays, 132*

5. *Affidavits.—Receiver.*—Affidavits, read on the hearing of a motion for an interlocutory order appointing a receiver, become a part of the record only by bill of exceptions, or proper order of court. *Barnes* v. *Jones, 161*

6. *Motions.—Record.*—Motions to strike out pleadings and to separate causes of action, and the rulings thereon, are brought upon the record only by bill of exceptions or special order of the court. *Herron* v. *Herron, 278*

7. *Motion to Strike Out.—When Alleged Error Considered.—Supreme Court.*—It is not necessary to file a motion in the Supreme Court to strike out a bill of exceptions; when such an objection is pointed out, or appears in the record, the court will consider it when deciding the case. *Creamer* v. *Sirp, 366*

8. *Same.—Presentment to Judge.—Filing.*—When time is given within which to file a bill of exceptions, and it appears from the bill of exceptions in the record, that it was presented to the judge within such time, this is sufficient under section 629, R. S. 1881, although the bill of exceptions was not filed within the time. *Ib.*

9. *Motion to Make Pleading Specific.*—A motion to make a pleading more specific can come into the record only by bill of exceptions or order of court. *Boyce* v. *Graham, 420*

10. *Same.—Time of Filing.*—A bill of exceptions filed after the term, on time given upon overruling a motion for a new trial, can not embrace matters occurring before the beginning of the trial. *Ib.*

11. *Same.—Presumption.*—When a bill of exceptions is filed within the term at which the ruling excepted to was made, it will be presumed to be in accordance with leave given at the time of the ruling. *Ib.*

BOARD OF COUNTY COMMISSIONERS.

See COUNTY COMMISSIONERS; HIGHWAY, 4, 6; PUBLIC SQUARE, 2; TOWN, 4 to 6; TOWNSHIP TRUSTEE.

BOND.

See CHATTEL MORTGAGE, 2 to 5; COSTS; COUNTY COMMISSIONERS; DECEDENTS' ESTATES, 9; PRACTICE, 1.

BROKER.

See CONTRACT, 3.

BURDEN OF ISSUE.

See DECEDENTS' ESTATES, 4; MORTGAGE, 4; PROMISSORY NOTE, 8, 17.

CANAL.

See EASEMENT, 2.

CASE OVERRULED.

*McQuigg* v. *McQuigg*, 13 Ind. 294, as to setting aside a decree of divorce, overruled. *Earle* v. *Earle*, 27

CERTIORARI.

See CRIMINAL LAW, 7.

CHANGE FROM JUDGE.

See INJUNCTION, 2.

CHANGE OF VENUE.

See CRIMINAL LAW, 10; SUPREME COURT, 2.

CHATTEL MORTGAGE.

1. *Recording.*—A chattel mortgage does not take effect until it is accepted by the mortgagee, and if recorded within ten days from such acceptance, it is sufficient under the statute, R. S. 1881, section 4913. *Eaton* v. *McKahan*, 109

2. *Sale of Goods on Execution.—Sheriff's Liability on Bond.—Damages.*—When personal property is encumbered by a mortgage, and is sold by the sheriff on an execution upon a subsequent lien, and possession is delivered to the purchaser without requiring him to comply with the conditions of the mortgage, the sheriff and his sureties are liable for the damages the mortgagee thereby sustains. *Kackley* v. *State, ex rel.*, 437

3. *Same.—Possession of Goods.—Accounting for Sales.*—In such case, if the mortgage by its terms permits the mortgagor to retain possession and sell the goods upon the condition that the sum of the sales, less current expenses, is to be applied upon the mortgage, the amount of such sales can not be augmented by adding thereto the amount of the sale of goods subsequently purchased. *Ib.*

4. *Same.— Consideration. — Evidence. — Principal and Surety. — Promissory Note.—Payment.*—Where, in an action upon the sheriff's bond in such case, the defendants insist that such mortgage was executed without consideration, the plaintiff may show that the mortgage was given him to secure him in part as the mortgagor's surety, and in part for money loaned, and may read in evidence notes made by him in discharge of such obligation, though not paid by him till after the commencement of the suit. *Ib.*

5. *Same.—Complaint.*—In an action on the sheriff's bond in such case, it is not necessary to aver in the complaint that such mortgage was made in part to indemnify him as surety. *Ib.*

CITY.

1. *Defect in Public Alley.—Constructive Notice.*—A city is chargeable with

constructive notice of the existence of a dangerous defect in a public alley. *Indianapolis* v. *Murphy*, 382

2. *Same.—Damages.—Evidence.—Verdict.*—In an action for damages for an injury resulting from dangerous defects in a public alley, one witness testified that the defect had existed for six weeks prior to the injury; other witnesses, in some measure, corroborated this testimony. The verdict of the jury indicated that the jury believed and acted upon this testimony.

*Held*, that from the length of time the defect had existed, and the other facts and circumstances of the case, the jury was warranted in inferring knowledge on the part of the city of the existence of such defect. *Ib.*

3. *Street.—Dedication.—Injunction.—Complaint.*—In a suit to enjoin a city from using a strip of ground as a street, the complaint must not only show that there has been no grant or condemnation of the land for a street, but also that there has been no implied dedication. *Faust* v. *Huntington*, 493

4. *Contract.—Legislative Power.—Drainage.*—The power of a city to drain lands within or without its corporate limits is a legislative power, to be exercised or not at discretion, and such discretion can not be surrendered by contract with the owners of such lands. *Peru* v. *Gleason*, 566

5. *Same.—Violation of Agreement to Construct Drain.—Damages.*—Within and adjoining a city was a tract of swampy land, injurious to the public, for the purpose of draining which the city contracted with G., a proprietor of a part of the swamp outside of the city limits, and other separate owners of parts of it within and without, whereby the city agreed to make a ditch within its limits, to serve as an outlet, and each proprietor to continue the same through his own tract. This would have rendered the swamp valuable. The city was authorized also to make lateral drains through the lands of G. and the others to intersect the principal one. G. and the other proprietors performed their agreement, but the city failed, and G. brought suit for breach of the contract, claiming damages in consequence of the injury to, and diminution in value of, his lands resulting from the fact that the water could not pass away.

*Held*, that the city was not liable for such damages. *Ib.*

6. *Municipal Corporation.—Street Improvement.—Sewers.—Errors in Judgment.—Liability to Lot-Owner.*—Where, in the improvement of a public street, a municipal corporation constructs a sewer in a skilful and careful manner, and keeps the same in good repair, it will not be liable in damages, as a general rule, to the owner of an abutting lot, for the errors in judgment or mistakes of the municipal authorities in regard to the capacity of the sewer to perform the work for which it was intended. *Rozell* v. *Anderson*, 591

## CLERK OF CIRCUIT COURT.

See COUNTY LIBRARY.

## COLLATERAL ATTACK.

See JUDGMENT, 7; TOWN, 4 to 6, 7.

## COMMON CARRIER.

*Wrongful Delivery.—Liability.—Damages.*—Where a person is engaged in the business of a common carrier by teams, and delivers the goods entrusted to him to the wrong person, and the goods are thereby lost, such carrier is liable for the loss. The fact that the consignor hands the driver of the team an envelope, containing a bill of the goods, to be signed by the consignee, properly directed to the consignee, but upon the corner the wrong street is named, furnishes no excuse for delivering the goods to the wrong person. *McCulloch* v. *McDonald*, 240

COMMON LAW.
See MARRIED WOMAN, 2.
CONDITION SUBSEQUENT.
See RAILROAD, 9, 10.
CONFLICT OF LAWS.
See PROMISSORY NOTE, 15.
CONSIDERATION.
See CHATTEL MORTGAGE, 4; CONTRACT, 1; DEED, 4; MARRIED WOMAN, 1; PROMISSORY NOTE, 1, 4 to 9, 18; RAILROAD, 10; TRUST AND TRUSTEE.
CONSIGNOR AND CONSIGNEE.
See COMMON CARRIER.
CONSTITUTIONAL LAW.
See DRAINAGE, 2; INJUNCTION, 1; JUDGMENT, 9; MORTGAGE, 5; SUPREME COURT, 4; TRIAL BY JURY.

1. *Legislative Appropriations.*—The Constitution prohibits the drawing of money from the State except in pursuance of appropriations made by law. *May* v. *Rice*, 546
2. *Same.—Enactment of Laws.*—The Constitution requires that laws shall be enacted by bill, and that the style shall be, "Be it enacted by the General Assembly of the State of Indiana." *Ib.*
3. *Same.—Joint Resolutions.—Auditor of State.*—Money can not be appropriated by joint resolution, nor can the auditor of State issue a warrant for money so appropriated. *Ib.*
4. *Drainage.—Trial by Jury.*—Section 4276, R. S. 1881, providing that questions of fact in proceedings for drainage shall be tried by the court without a jury, is constitutional. *Anderson* v. *Caldwell*, 451
5. *Injunction.*—In a suit for an injunction there is no constitutional right of trial by jury. *Helm* v. *First Nat'l Bank*, 44
6. *Foreclosure.*—In a suit on a note and mortgage praying foreclosure, there is no constitutional right to a trial by jury. *Carmichael* v. *Adams*, 526

CONTRACT.
See ATTORNEY AND CLIENT; CITY, 4, 5; COMMON CARRIER; COUNTY COMMISSIONERS; DEED; HIGHWAY, 6; INSURANCE; LANDLORD AND TENANT; MARRIED WOMAN, 2, 3; MORTGAGE; PROMISSORY NOTE; RAILROAD, 9, 10; SALE; STATUTE OF FRAUDS; TOWN, 2, 3; TRUST AND TRUSTEE; VENDOR AND VENDEE.

1. *Consideration.—Fraud.—Pleading.—Instruction.*—To a suit against A. and B. upon their written promise to pay a certain sum of money, A. answered (1) that the plaintiff accepted from him a sum less than the amount due, in satisfaction of his promise, and gave him a written release therefrom; (2) that being insolvent and largely indebted to one C., he had delivered to him as security certain bonds, which he had sold to apply on such indebtedness, but, by an agreement between C. and the plaintiff, C. paid to him a certain sum in full satisfaction of A.'s liability on the promise sued on, and in writing released him from all liability. Reply (1) that the release was obtained by false and fraudulent representations; (2) that, by reason of such false and fraudulent representations, there was a failure of the consideration of the release.

*Held*, that the replies were sufficient on demurrer.

*Held*, also, that the facts averred showed a failure of consideration for the release.

*Held*, also, that B. not having been served with process, and not having appeared to the action, no error was committed in instructing the jury that "they had nothing to consider as to B." *Wells* v. *Morrison*, *51*

2. *Wager.—Public Policy.—Marriage Benefit Company.*—A contract to pay a sum of money on condition that the payee do not marry within two years, and if he do then to pay a certain sum per day during the time he shall remain single, is contrary to public policy, and, therefore, illegal and void, and money paid in consideration of such contract can not be recovered back, the parties being *in pari delicto.* *Chalfant* v. *Payton*, *202*

3. *Real Estate Broker.—Commission.*—A contract with a real estate broker to pay him a certain sum in case he finds a purchaser for designated real estate at a price fixed, need not be in writing, and the broker, upon producing a purchaser ready, able and willing to purchase at the price and on the terms fixed, with notice thereof to his employer, is entitled to his commission, though the employer may refuse to sell. *Fischer* v. *Bell*, *243*

4. *Agreement.—Action on Contract Made with Ancestor.—Evidence.—Testimony of Parties.—Statute Construed.*—A father and mother conveyed lands to a son; thereafter, in consideration of such conveyance, and the transfer of certain personal property, the son agreed, in writing, with the father, that after the death of the father and mother he would pay each of his sisters $100; after such death a sister sued on the contract. *Held*, that such sister did not claim as *heir* or *devisee* within the meaning of section 499, R. S. 1881, which prohibits parties so claiming from testifying, and the plaintiff had a right to testify that she accepted such contract. *Creamer* v. *Sirp*, *366*

5. *Same.—Modification of by Father and Son, After Acceptance, and Without Sister's Consent.*—When, in such case, the sister has accepted such agreement, it becomes an executed contract so far as she is concerned; and her rights thereunder can not be altered by any new agreement between father and son; and it is not error to exclude evidence as to such new agreement. *Ib.*

6. *Execution.—Complaint.*—The signing alone by one party of a writing purporting to be an agreement, without delivery to or acceptance by the other party, is not an execution of the agreement, and in an action by the latter thereon a complaint which fails to aver an acceptance or delivery is insufficient on demurrer. *Elliott* v. *Champ*, *398*

CONTRIBUTION.

See PROMISSORY NOTE, 10.

CONVEYANCE.

See DEED; FRAUDULENT CONVEYANCE; MORTGAGE; RAILROAD, 9, 10; SHERIFF'S SALE, 2; TAXES, 1; TRUST AND TRUSTEE; VENDOR AND VENDEE, 4; WILL, 1.

COPY.

See CRIMINAL LAW, 11; LANDLORD AND TENANT, 1; PROMISSORY NOTE, 14, 17; VENDOR AND VENDEE, 2.

CORPORATION.

See CITY; CONTRACT, 2; COUNTY LIBRARY; GRAVEL ROAD; RAILROAD, 6; TOWN.

COSTS.

See JUDGMENT, 4.

*Practice.—Cost Bond.*—Non-resident relators, for whose use suit is brought, may be compelled to give security for costs. *State, ex rel.*, v. *Roche*, *406*

## COUNTER-CLAIM.

See INJUNCTION, 2; REAL ESTATE, ACTION TO RECOVER, 1; SALE, 2; STATUTE OF LIMITATIONS, 2.

## COUNTY AUDITOR.

See COUNTY LIBRARY; RAILROAD, 5; SCHOOL FUND MORTGAGE.

## COUNTY CLERK.

See COUNTY LIBRARY.

## COUNTY COMMISSIONERS.

See HIGHWAY, 4, 6; PUBLIC SQUARE, 2; TOWN, 4 to 6; TOWNSHIP TRUSTEE.

*Duty of County Board.—Contract for Work.—Contractor's Bond.*—Under section 4246, R. S. 1881, it is the duty of the county board to let no contract for any county building or work until the contractor has first given a good and sufficient bond, payable to the State of Indiana, signed by at least two freehold sureties, guaranteeing the accomplishment of two purposes, namely: 1. The faithful performance and execution of the work; and, 2. The prompt payment by the contractor of all debts incurred by him in the prosecution of the work, including labor, materials furnished, and for boarding the laborers thereon. As to the second of these purposes, for any breach thereof by the contractor, the right of action is in the laborer, the material-man, or the person boarding the laborers, and can not be defeated by any act done, or omitted to be done, by the county board. *Dewey* v. *State, ex rel.*, *173*

## COUNTY LIBRARY.

1. *County Clerk, Auditor and Recorder, Ex-Officio Trustees.—Powers and Duties.—Surplus Library Fund.*—Under section 3784, R. S. 1881, the clerk, auditor and recorder of the county are *ex-officio* trustees of the county library, and, as such trustees, they are authorized by section 3788, R. S. 1881, to loan the surplus library fund for any term not exceeding five years, with seven per cent. interest payable annually in advance. *Traylor* v. *Dykins*, *229*

2. *Same.—Mortgage to Trustees.—Estoppel.*—When it appears that the defendant has borrowed the surplus fund of the county library, and has executed his note and mortgage therefor to the county clerk, auditor and recorder, as trustees of the county library, he is estopped from denying the corporate existence of such library, or that the officers named are *ex-officio* trustees of the library and, therefore, the trustees of an express trust. *Ib.*

## COUNTY RECORDER.

See COUNTY LIBRARY; OFFICE AND OFFICER, 2.

## COVENANTS.

See DEED, 1; PROMISSORY NOTE, 12.

## CRIMINAL LAW.

See INTOXICATING LIQUOR; JUDGMENT, 6.

1. *Insanity.—Evidence.*—There is, according to the law of this State, no condition intermediate between sanity and insanity, which, though not excusing crime, may mitigate it. R. S. 1881, sections 1285, 1764, 1765. But independently of the plea of insanity in a criminal case, the defendant may show his general physical and mental condition at the time of the commission of the offence. *Sage* v. *State*, *141*

2. *Same.—Witness.—Opinion.*—A witness, not an expert, upon testifying to acquaintance with and frequently seeing the person whose sanity is in question, during a period of two years, may, without stating other facts, give his opinion concerning the question of sanity. *Ib.*

3. *Minors.—Billiards.—Indictment.*—An indictment for the violation of section 2087, R. S. 1881, by permitting a minor to play billiards, which does not aver that the act of the defendant was unlawful, or show that the case was within the exception contained in section 2089, is bad on motion to quash. *State* v. *Dupies*, 233

4. *Public Nuisance.—Slaughter-House.—Noisome and Offensive Smells.—Instruction.—Error.*—Where the proprietors of a slaughter-house are prosecuted for maintaining a public nuisance by allowing the offal of slaughtered cattle and other animals to there accumulate, and noisome and offensive smells are emitted therefrom, the fact, if it be the fact, that such smells are blended with like smells emanating from another slaughter-house and other offal there accumulated, owned by other parties, is no defence in a prosecution against the defendants only, and can not justify or excuse their offence; and an instruction of the court to that effect is not erroneous. *Dennis* v. *State*, 291

5. *Same.—Information.—Description.—Evidence.—Variance.*—In a prosecution for the maintenance of a public nuisance, matter of description in the information, as to the location of the nuisance, must be proved as charged, and a variance will be fatal; and an instruction to the jury, to the effect that it will be sufficient if they find a part only of such matter of description, is erroneous. *Ib.*

6. *Appeal.—Question Reserved.—Record.—Verdict.—Judgment.*—In case of an appeal, upon the part of the State, from a question reserved, in a criminal case, no question is presented to the Supreme Court where the record does not contain the verdict and judgment of acquittal. *State* v. *Hallowell*, 376

7. *Same.—Statute Construed.—Certiorari.—Transcript.*—Under section 1883, R. S. 1881, it is not the duty of the Supreme Court, in such case, on its own motion, to direct the clerk to certify up a correct record. The writ of certiorari can issue only upon motion sustained by affidavit, showing a diminution of the record. *Ib.*

8. *New Trial.*—By the provisions of section 1842, R. S. 1881, a motion for a new trial in a criminal case may be filed after judgment, during the term at which it was rendered. *Calvert* v. *State*, 473

9. *Same.—Bill of Exceptions.—Time of Filing.*—A bill of exceptions filed in a criminal case during the term at which the cause is tried, or within such time thereafter, if leave is granted during the term, as the court may direct, not exceeding sixty days, is properly filed, and constitutes a part of the record. *Ib.*

10. *Recognizance.—Forfeiture.—Justice of the Peace.—Change of Venue.*—One who is under recognizance in the form prescribed by statute, R. S. 1881, section 1644, to appear before a justice of the peace to answer a criminal charge, and who, upon obtaining a change of venue, fails upon the order of the justice to enter into a new recognizance for his appearance before the justice to whom the venue is changed, forfeits his recognizance. *Fowler* v. *State*, 507

11. *Same.—Complaint.—Exhibit.*—In a complaint upon a recognizance taken and forfeited before a justice of the peace in a criminal case, it is not necessary to exhibit a copy of the justice's certificate of forfeiture. *Ib.*

12. *Same.—Judgment.—Entry of.*—The statute, R. S. 1881, section 1489, prescribing the time when a justice of the peace shall enter his judgment, does not apply to criminal cases. *Ib.*

13. *Judgment, Delay of.*—Under section 1767, R. S. 1881, upon a plea of guilty, the court is not bound to pronounce judgment *eo instanti*, but may delay it for the purpose of hearing testimony as to aggravating or palliating circumstances. *Smith* v. *Hess*, 424

## CROSS COMPLAINT.

See VENDOR AND VENDEE, 2.

## DAMAGES.

See CHATTEL MORTGAGE, 2 to 5; CITY, 2, 5, 6; COMMON CARRIER; HIGHWAY, 1; LANDLORD AND TENANT; PLEADING, 6; SALE, 2.

## DECEDENTS' ESTATES.

See DESCENTS; EVIDENCE, 10, 11; PAYMENT, 2; PROMISSORY NOTE, 19; WILL.

1. *Partnership.*—Partnership creditors can have distribution of the surplus only of the individual estate of a deceased partner after the payment of his individual debts. *Warren* v. *Able, 107*

2. *Judgment. — Lien on Decedents' Lands.—Statutes Construed.—Death, Presumption of.*—J. obtained a judgment against R., which became a lien on the lands of the latter on the 18th of March, 1868. In November, 1867, R. disappeared and was not afterwards heard of, but no administrator of his estate was appointed until November, 1879, and after that a suit was begun, under section 621, R. S. 1881, to enforce the lien of the judgment against lands of which R. was seized when the judgment was rendered.

*Held*, that the lien, as given by section 608, R. S. 1881, was lost by delay.

*Held*, also, that the death of R., presumed to have occurred in November, 1872, R. S. 1881, section 2232, did not restrain proceedings to enforce the lien until after his administrator was actually appointed in 1879, but only until an administrator might have been appointed at the instance of the judgment creditor as provided by section 2227. *Jones* v. *Detchon, 154*

3. *Aggrieved Party.—Appeal to Supreme Court.—Statute Construed.*—Under sections 2454 and 2455, R. S. 1881, any person considering himself aggrieved by *any* decision of a circuit court, growing out of any matter connected with a decedent's estate, may prosecute an appeal to the Supreme Court, in the manner and within the time prescribed therein. Such an appeal is not governed by the provisions of section 632, R. S. 1881, regulating appeals from final judgments in civil actions. *Taylor* v. *Burk, 252*

4. *Same.—Final Settlement Report.—Exceptions.—Trial of Questions of Fact.—Burden of Issue.—Open and Close.*—Where the executor or administrator submits to the court his final settlement report, in the matter of his decedent's estate, and exceptions are filed to such report, requiring the trial of questions of fact, the burden of the issue is on the executor or administrator to sustain and establish the correctness of his report, and he has the right to open and close both the evidence and argument, on the trial of the cause. *Ib.*

5. *Same.—Property Omitted from Inventory.—Instruction.—Error.—Evidence.*—Where it appears in the written objections and exceptions to the confirmation of the final settlement report, that the decedent was possessed, at the time of his death, of money, notes, accounts and other property, which came to the hands of his executor and had not been charged to him either in his inventory of the estate or in any subsequent report, and specifying, among other items of the decedent's property, a certain promissory note, a sum of money in gold and another sum in currency, and evidence is introduced tending to sustain the exception as to each of the specifications, it is error for the court to instruct the jury, that if the decedent, in his lifetime, gave the note or any part of it to the executor and perfected the gift by delivery, they must find for the executor "on this exception." *Ib.*

6. *Same.—Evidence.—Testator's Unsoundness of Mind.*—Where, on the trial

of such exception, the executor has introduced evidence tending to prove a settlement between him and his testator, during the last illness of the latter and only a few days before his death, under which he had surrendered the executor's note to him for but little more than one-half of its face value, and when there is other evidence before the jury tending to show that, at the time of such settlement, the testator was eighty years old, of unsound mind and incapable of transacting business, it is error to instruct the jury that they must not consider the question of the soundness or unsoundness of mind. *Ib.*

7. *Growing Crops.—Widow's Rights.—Complaint.*—Adjacent to the dwelling of an intestate was, when he died, a field of twenty acres of growing wheat—part of his farm. His widow, a second wife, made no selection of forty acres, as her quarantine, under the statute, R. S. 1881, section 2492, which did not include the wheat field. The administrator, as such, took the wheat, too, and she sued him as administrator to recover its value.

*Held*, that her complaint averring these facts was good on demurrer. *Hoover* v. *Agnew, 370*

8. *Same.—Statute Construed.*—The widow's right of quarantine, under the statute, belongs to any widow, and does not depend upon the existence of minor children. *Ib.*

9. *Appeal to Supreme Court.*—By the statutes in force March 11th, 1881, an administrator might appeal to the Supreme Court from the allowance of a claim without bond, and file the transcript within one year. *Jones* v. *Jones, 378*

DECLARATIONS.

See DEED, 5; PROMISSORY NOTE, 19.

DEDICATION.

See CITY, 3; PUBLIC SQUARE, 2, 3.

DEED.

See MORTGAGE, 2, 3; RAILROAD, 9, 10; SHERIFF'S SALE, 2; TAXES, 1; VENDOR AND VENDEE, 4; WILL, 1.

1. *Covenants.—Encumbrance.—Agreement.—Delinquent Taxes.*—A. conveyed lands to B. by deed with covenants, upon which there were delinquent taxes, which B. afterwards paid. To a suit for breach of the covenants A. answered: 1. A written contract, contemporaneous with the deed, whereby it was agreed that the covenants of the deed should only be deemed to warrant the title against all conveyances and incumbrances made by A., and all acts done or suffered by him; 2. That A. had abundant other property out of which the treasurer could have made the taxes.

*Held*, that both defences were bad on demurrer. *Rinehart* v. *Rinehart, 89*

2. *Mistake.—Description.—Reformation by Purchaser at Sheriff's Sale.—Equity in Lands.*—By reason of a misdescription of lands in a deed, a grantee did not obtain the legal title, but was put in possession. Before the mistake was discovered the lands were sold on execution against the grantee, and A. became the purchaser and took possession.

*Held*, that A. acquired no title either at law or in equity, and could not maintain a suit to reform the deed. *Conner* v. *Wells, 197*

3. *Fraud.—Rescission.—Tender of Repayment.—Complaint.*—A complaint to set aside a deed because of fraud, which fails to show an offer to put the grantee *in statu quo* by repayment of the purchase-money, is bad; nor is it sufficient to aver as an excuse that the defendant has concealed the amount in order to avoid a tender. without an offer to pay. *Burgett* v. *Teal, 260*

4. *Consideration.—Evidence.*—Parol evidence is admissible to show that the consideration of a deed, recited therein to be one dollar, was in fact natural love and affection. *Kenney* v. *Phillipy, 511*

5. *Same.—Statement of Grantor.—Res Gestæ.*—The statements of the grantor in a deed, which is in evidence, made at the time of its execution, are always admissible in evidence as part of the *res gestæ*. *Ib.*

6. *Same.—Witness.—Agent.—Statute Construed.*—A scrivener employed to prepare a deed is not an agent contemplated by section 500, R. S. 1881, which makes a living party a witness to a transaction with one deceased when an agent of the deceased has testified concerning it. *Ib.*

7. *Contract.—Rescission.—Lien for Purchase-Money.—Notice.—Executed Gift.—Infant.—Acceptance.*—A mother by deed conveyed lands to a son specifying therein that the consideration was natural love and affection and the sum of $300, to be paid by the grantee to another son J., an infant, when he became twenty-one years of age, "which the grantee hereby obligates himself to do." As evidence of his acceptance of the deed, and his obligation to pay as recited, the grantee also signed and acknowledged the deed, and had it properly recorded. J., on reaching his majority, sued upon the contract, making the grantee and N. and I. defendants, averring in his complaint the foregoing facts, a breach of the contract, that the grantee was a non-resident with no personal property in this State, and that N. and I. became owners of the land by purchase afterwards.

*Held*, that the complaint was good against each defendant—against the grantee for a personal judgment, and against N. and I. to enforce a lien for purchase-money, of the non-payment of which the recorded deed was, to them, constructive notice.

*Held*, also, that an answer by N. and I., that the contract was rescinded by the parties thereto while the plaintiff was an infant, and before he had knowledge of it, and the land reconveyed to the mother, from whom N. and I. afterwards purchased, paying full value, without actual notice of the plaintiff's claim, and that no valuable consideration moved from him, was bad on demurrer. *Pruitt* v. *Pruitt, 595*

DELIVERY.

See Common Carrier; Promissory Note, 16.

DEMAND.

See Insurance, 1; Statute of Limitations, 1.

DEMURRER.

See Landlord and Tenant, 1; Pleading, 2, 5, 6, 8, 10; Supreme Court, 9, 10, 17.

DESCENTS.

See Decedents' Estates, 7, 8.

*Reversion.*—An estate, granted in consideration of love and affection, reverts to the grantor, if living, upon the death of the grantee intestate, without issue, and unmarried. R. S. 1881, section 2473. *Kenney* v. *Phillipy, 511*

DESCRIPTION.

See Criminal Law, 5; Deed, 2; Landlord and Tenant, 2, 3.

DEVISE.

See Will, 1.

DILIGENCE.

See Divorce, 5, 6.

DISCRETION.

See Practice, 2; Supreme Court, 12.

## DIVORCE.

1. *Setting Aside Decree.*—A decree of divorce can not be reviewed under the statute authorizing the review of judgments in ordinary civil actions. *Earle* v. *Earle, 27*

2. *Same.—New Trial.—Practice.*—A new trial in an action for a divorce can not be had after the term at which the decree may have been rendered, under the statute providing for new trials in other civil causes. *Ib.*

3. *Same.—Judgments, Power of Courts to Set Aside.*—The power of courts to set aside judgments are not restricted by the statutory provisions in relation to the vacation of judgments to the causes and modes therein specified, to the exclusion of all other causes and modes. *Ib.*

4. *Same.—Fraud.*—Courts have power, in a direct proceeding, to set aside and vacate judgments obtained by a fraud upon the court, and this power extends to decrees of divorce. *Ib.*

5. *Same.—Diligence.*—It is necessary, in order to set aside a decree of divorce on account of fraud in obtaining it, that the party complaining should commence the action therefor without unreasonable delay upon discovery of the fraud, so that innocent third parties may not suffer. *Ib.*

6. *Same.—When Court Will Not Set Aside.*—A decree of divorce, valid upon the face of the record, will not be set aside for fraud if the party asking it, with knowledge of the fraud, has delayed bringing an action therefor for nearly fifteen years after the decree, the other party having entered into a marriage with an innocent party, and having children born of such marriage. *Ib.*

## DRAINAGE.

See CITY, 4, 5.

1. *Special Proceeding.—Failure to Remonstrate.—Assessment.—Relief From.—Statute Construed.*—A proceeding under the drainage act of April 8th, 1881 (sections 4273 to 4284, R. S. 1881), for the construction of a ditch or drain, is not a civil action, and the provisions of section 396, R. S. 1881, of the civil code, are not applicable to such a proceeding. *Hays* v. *Tippy, 102*

2. *Constitutional Law.—Trial.—Jury.*—Section 4276, R. S. 1881, which provides that questions of fact in proceedings for drainage shall be tried by the court without a jury, is constitutional. *Anderson* v. *Caldwell, 451*

3. *Suit by Drainage Commissioner for Assessment.—Lien.—Notice.—Complaint.*—A complaint by a drainage commissioner, under section 4277, R. S. 1881, to enforce a lien upon lands for benefits assessed, is insufficient unless it avers that notice of the establishment of the work by the court has been recorded in the recorder's office of the county, as a lien for such assessments does not attach until such notice has been recorded. *North River Bank* v. *State, for Use of Busenburg, 476*

## EASEMENT.

See HIGHWAY, 1; PUBLIC SQUARE, 2, 3.

1. *Right to Overflow Land.—Ownership of Ice Formed There.*—The owner of an easement to overflow another's land is not entitled to the ice which forms on the water covering the land; such ice belongs to the owner in fee. *Brookville, etc., Co.* v. *Butler, 134*

2. *Same.—White Water Valley Canal.—Right to Take Ice Found on Overflowed Land.*—In constructing the White Water Valley Canal, a large pond producing ice on low lands adjoining and beyond the canal was formed by the flow of water from the canal, the lands covered by which pond had been used by the State and its grantee, the canal company, only for the purpose of overflow. The plaintiff was the grantee of the "canal and its appurtenances."

*Held*, that only the right to overflow, and not the land overflowed itself, was appurtenant to the canal, and that the right to gather ice upon the pond did not belong to the plaintiff, but to the owner of the soil, subject to the condition that no injury should be done to the easement of the plaintiff, and that the quantity of water should not be materially lessened. *Ib.*

EJECTMENT.

See LANDLORD AND TENANT, 1 to 4; REAL ESTATE, ACTION TO RECOVER.

ENDORSER AND ENDORSEE.

See PROMISSORY NOTE, 5 to 9, 11; VENDOR AND VENDEE, 2.

EQUITY.

See DEED, 2; INJUNCTION, 1; JUDGMENT, 10; MORTGAGE, 2, 3, 5; PROMISSORY NOTE, 1; REAL ESTATE, ACTION TO RECOVER, 1.

ESTOPPEL.

See ASSIGNMENT OF ERROR; COUNTY LIBRARY, 2; SUPREME COURT, 17.

EVIDENCE.

See ATTORNEY AND CLIENT, 2; BASTARDY, 1; BILL OF EXCEPTIONS, 3; CHATTEL MORTGAGE, 4; CITY, 2; CONTRACT, 4, 5; CRIMINAL LAW, 1, 2, 5; DECEDENTS' ESTATES, 5, 6; DEED, 4 to 6; EXECUTION, 2; HIGHWAY, 3; LANDLORD AND TENANT, 2; MORTGAGE, 4; NEW TRIAL; PRACTICE, 2; PROMISSORY NOTE, 3, 5, 8, 19; RAILROAD, 6, 8; SUPREME COURT, 3, 6, 7, 9, 13, 14, 18, 20, 21; TAXES, 1, 2; VENDOR AND VENDEE, 1, 2; WITNESS.

1. *Writing, Contradicting by Parol.—Fraud.*—One not a party to a written instrument, and who seeks to impeach it as being a means adopted by the opposite party to defraud him, may contradict it by parol evidence. *Burns* v. *Thompson*, 136
2. *Judge's Notes.*—The judge's notes of evidence are not ordinarily admissible as evidence in the trial of another issue. *Citizens, etc., Bank* v. *Adams*, 280
3. *Same.—Harmless Error.*—The admission of improper evidence which tends only to prove a fact which is fully established by all the other evidence, is a harmless error. *Ib.*
4. *Title.*—Proof by the plaintiff of his title as alleged is always admissible. *Boyce* v. *Graham*, 420
5. *Same.*—When both parties claim title derived from the same person, it is sufficient proof of the plaintiff's title if he trace it from that person to himself.
6. *Testimony of Witness on Former Trial.*—A refusal to permit a party to read to the jury only what purports to be the testimony of the opposite party, on a former trial of the cause, and taken down and saved by a demurrer to the evidence then filed, is not error, it not appearing that the evidence offered was in fact given at the former trial. *Woollen* v. *Whitacre*, 502
7. *Same.*—Where a witness who testified on a former trial of the cause is not shown to be dead, it is not proper to permit proof of his evidence then given to go to the jury. *Ib.*
8. *Principal and Agent.—Letters.*—Letters written by an agent in reference to the matter in controversy are legitimate evidence against his principal, in favor of the adverse party. *Wells* v. *Morrison*, 51
9. *Statements of Agents.*—The statements of an agent while acting as such, concerning the matter in which he is acting as agent, are admissible in evidence against his principal. *Burns* v. *Thompson*, 140

10. *Contract Made with Ancestor.—Testimony of Parties.—Statute Construed.*—A father and mother conveyed lands to a son; thereafter, in consideration of such conveyance and the transfer of certain personal property, the son agreed, in writing, with the father, that after the death of the father and mother he would pay each of his sisters $100; after such death a sister sued on the contract.

*Held*, that such sister did not claim as *heir* or *devisee* within the meaning of section 499, R. S. 1881, which prohibits parties so claiming from testifying, and plaintiff had a right to testify that she accepted such contract. *Creamer* v. *Sirp*, *366*

11. *Same.—Modification of Contract after Acceptance.*—When, in such case, the sister has accepted such agreement, it becomes an executed contract so far as she is concerned; and her rights thereunder can not be altered by any new agreement between father and son; and it is not error to exclude evidence as to such new agreement. *Ib.*

EXCEPTION.

See BILL OF EXCEPTIONS; SUPREME COURT, 7, 16.

EXECUTION.

See CHATTEL MORTGAGE, 2; FRAUDULENT CONVEYANCE; JUDGMENT, 10; SHERIFF'S SALE; STATUTE OF FRAUDS, 2.

1. *Proceedings Supplementary.—Practice.*—In proceedings supplementary to execution, formal pleadings are not required, and rulings thereon are immaterial and harmless. *Wallace* v. *Lawyer*, *128*

2. *Same.—Evidence.*—Proceedings supplementary, based on the averment that the execution defendant conceals his property and wrongfully refuses to apply it, etc., are not sustained by proof only that he has real estate within reach of execution, and that debts are due him. *Ib.*

3. *Exemption from Execution.—When Claimed.—Property Attached.—Answer.*—Property exempt from execution is not subject to seizure under an order of attachment; but where such property has been attached, and the defendant has the right to claim the same as exempt, he must do so by his answer before final judgment in the attachment proceeding, or his claim will come too late. *Haas* v. *Shaw*, *384*

4. *Same.—Reply.—Demurrer.*—Where, in such case, the defendant answers, showing his right to claim, and claiming, the attached property as exempt from execution and seizure under the attachment, a reply to such answer, to the effect that the defendant has other property, describing it, besides the property attached, is bad on demurrer for the want of sufficient facts. *Ib.*

EXECUTOR.

See DECEDENTS' ESTATES, 4 to 6.

EXEMPTION.

See EXECUTION, 3, 4; SHERIFF'S SALE, 1.

EXHIBIT.

See CRIMINAL LAW, 11; LANDLORD AND TENANT, 1; PROMISSORY NOTE, 14, 17; VENDOR AND VENDEE, 2.

FENCE.

See RAILROAD, 2, 3.

FORECLOSURE.

See COUNTY LIBRARY; JUDGMENT, 10; MARRIED WOMAN, 1; MORTGAGE; VENDOR AND VENDEE, 2.

FORFEITURE.

See CRIMINAL LAW, 10, 11; INSURANCE, 2.

## FORGERY.

See PROMISSORY NOTE, 1, 11; VENDOR AND VENDEE, 2.

## FORMER ADJUDICATION.

See JUDGMENT, 10; PARTITION, 2; PAYMENT, 2; PROMISSORY NOTE, 10.

## FRAUD.

See CONTRACT, 1; DEED, 3; DIVORCE, 4 to 6; EVIDENCE, 1; INSURANCE, 2; PARTNERSHIP, 2; PROMISSORY NOTE, 1, 6 to 9, 17; SALE, 2; TAXES, 4.

*Pleading.—Intention.—Negligence.*—The use of epithets in a pleading is not sufficient to show fraud, but the facts constituting the fraud must be distinctly averred. An intention to deceive must appear, and that in reliance upon the facts, with the use of ordinary care, they were acted upon in good faith and the deception accomplished, to the prejudice of the other party. *Hardy* v. *Brier*, *91*

## FRAUDULENT CONVEYANCE.

See SHERIFF'S SALE, 2; STATUTE OF LIMITATIONS, 3.

*Title.—Execution.—Pleading.*—When, for the purpose of defrauding his creditors, a debtor pays for lands, taking title thereto in the name of another, the lands may be sold on execution to satisfy a judgment of the creditor; but to maintain his title, or to establish it against the holder of the legal title, or those claiming under him, the purchaser upon the execution must show that, at the time of the conveyance, and at the time of sale, the debtor had not other property subject to execution sufficient to satisfy the judgment. *Eve* v. *Louis*, *457*

## GIFT.

See DECEDENTS' ESTATES, 5; DEED, 7; WILL, 2.

## GOOD-WILL.

See SALE.

Good-will, as property, is intangible, and merely an incident of other property. As a general rule, it is not an incident of a stock of merchandise, but of locality or place, of the store room or place of business. *Rawson* v. *Pratt*, *9*

## GRAVEL ROAD.

See HIGHWAY, 6.

1. *Tolls.—Injunction.—Complaint.*—A complaint to enjoin a turnpike company from collecting tolls showed that the pike was six miles long, all of which was in good condition and finished, except two miles which were not finished so as to authorize the collection of tolls thereon, and it was not averred that tolls were exacted upon the two miles, or that the plaintiffs were hindered from passing over the same unless tolls were paid, but merely that tolls were demanded and had been paid therefor by the plaintiffs; nor was it averred that the plaintiffs had in the use of that part of the road any interest beyond that of the general public.

*Held*, that the complaint was bad on demurrer.

*Sidener* v. *Haw Creek T. P. Co.*, *186*

2. *Same.*—Injunction will not lie to prevent the wrongful collection of tolls by a turnpike company which merely demands the tolls without hindering the passage of those who do not pay. *Ib.*

3. *By-Laws. — Non-Payment of Toll.* — A gravel road company has no power, under section 3642, to fix a greater penalty for the non-payment of tolls than $3, which is fixed by section 3644.

*Wayne, etc., Co.* v. *Bosworth*, *210*

GROWING CROPS.

See DECEDENTS' ESTATES, 7.

GUARDIAN AND WARD.

See STATUTE OF LIMITATIONS, 1; TAXES, 4.

*Compensation for Board and Education of Ward.—Judgment.*—A guardian has no claim to credit against his ward's estate for money expended for board and education, unless it appears that there was no parent of the ward able or willing to provide therefor, and that the ward's estate justified the expenditure; and an answer to an action on the guardian's bond, claiming credit for such expenditures, which fails to aver such facts, although a judgment by confession had been taken for such a claim against the guardian, is insufficient. *State, ex rel.*, v. *Roche*, 406

HABEAS CORPUS.

See JUDGMENT, 8.

HARMLESS ERROR.

See EVIDENCE, 3; PLEADING, 5, 8; PRACTICE, 3, 5; SUPREME COURT, 9, 10; VERDICT, 2.

HEIR.

See CONTRACT, 4; EVIDENCE, 10.

HIGHWAY.

See GRAVEL ROAD; PUBLIC SQUARE, 2, 3; RAILROAD, 1.

1. *Action for Obstructing.—Who May Maintain.—Special Injury.—Private Way.—Easement.—Damages.*—A personal action for damages for obstructing a public highway can not be maintained where the obstruction is an injury to the plaintiff only in the same manner that it is to all other citizens. Such an action lies only where the obstruction causes one special injury to his person, trade or estate. The *gravamen* of an action for obstructing a private way is the obstruction; in case of a public way it is the special injury to the plaintiff, and the prohibition by one through whose lands a public highway passes, from passing upon the way, and to cease to use it, or refrain from using it, because of such prohibition, and because such person has wrongfully obstructed it, will not constitute a special injury, or give a right of action for loss or inconvenience arising from going a more circuitous and difficult way. *Powell* v. *Bunger*, 64

2. *Same.—Verdict.—Judgment.—Error.—Supreme Court.—Petition for Rehearing.*—Complaint in two paragraphs for obstructing a highway, the first alleging an obstruction by defendant of the plaintiff's private way, and the second the obstruction of a public highway; the first asked that the plaintiff's way might be established, his right thereto quieted, the defendant enjoined, and for damages; the second asked for damages and an injunction; a demurrer was overruled to the second; the case was then put at issue, trial by jury had, with a general verdict for plaintiff for nominal damages, and judgment rendered thereon for such damages, and enjoining defendants from molesting the plaintiff's use of the private way and also the highway; on appeal to the Supreme Court by defendant, the ruling of the lower court on the demurrer is held to be error, and judgment reversed; appellee then files petition for a rehearing, alleging as reasons that the court should have reversed the judgment only so far as it was based on the second paragraph of the complaint, and should have affirmed it as to the first paragraph, offering to remit any recovery under the second paragraph, and asking the court to modify its judgment accordingly.

*Held*, on such petition, that the court could not make the modification asked without a rehearing.

*Held*, also, that the judgment could not be affirmed in part without examining and determining whether there is any other error in the record than that pointed out in the original opinion in the ruling on the demurrer.

*Held*, also, that the verdict was general, and the judgment thereon was based on each paragraph, and the Supreme Court can not sever the judgment so that it can say that a certain definite part thereof is affected by the error in ruling on the demurrer, and that the remainder is unaffected thereby. *Ib.*

3. *Public Utility.—Witness.—Opinion.—Evidence.*—The opinion of a witness as to the public utility of a proposed highway is not admissible in evidence under any circumstances. *Dillman* v. *Crooks*, *158*

4. *Same.—Practice.—Appeal.*—On appeal from an order of the board of county commissioners establishing a highway, a motion to set aside the proceedings of the board is unwarranted and useless. *Ib.*

5. *Same.—Petition.—Uncertainty.—Names of Land-owners.—Arrest of Judgment.*—Uncertainty in a petition for a highway as to the names of owners of lands affected, is no cause for arrest of judgment on appeal in the circuit court. *Ib.*

6. *Free Turnpike Roads.—Statute Construed.—County Board.—Engineer.—Error in Contract.—Complaining Party.*—Under section 5095, R. S. 1881, after an order is made for the construction or improvement of a free turnpike or gravel road, or for any change in the same, it is the duty of the county board to appoint a competent engineer to superintend the work, who shall, with the approval of the county commissioners, make a contract for the performance of the work; but, under section 5102, R. S. 1881, no person is permitted to take advantage of any error committed by the county commissioners, or by the engineer or surveyor, or of any informality, error or defect appearing in the record of such proceedings, unless it is shown that the complaining party is injuriously affected thereby. *Dewey* v. *State, ex rel.*, *173*

HUSBAND AND WIFE.

See MARRIED WOMAN; PROMISSORY NOTE, 12; WILL, 2.

INDICTMENT.

See CRIMINAL LAW, 3; INTOXICATING LIQUOR, 2.

INFANT.

See CRIMINAL LAW, 3; DEED, 7.

*Infancy.—Complaint.—Next Friend.*—Where an infant sues by next friend, it is not necessary to aver in the complaint that the plaintiff is an infant, or that the written consent of the next friend had been filed. *Dodd* v. *Moore*, *522*

INFORMATION.

See OFFICE AND OFFICER.

INJUNCTION.

See BANKRUPTCY; CITY, 3; GRAVEL ROAD, 1, 2; JUDGMENT, 10; TOWN, 8.

1. *Trial.—Jury.*—A court of equity only can give relief by injunction, and in a suit therefor there is no right to a jury trial. R. S. 1881, sections 65, 409. *Helm* v. *First Nat'l Bank*, *44*

2. *Same.—Judgment.—Counter-Claim.—Change from Judge.—Waiver.*—A. sued B. and C. to enjoin the collection of a judgment held by C. against A. and B., alleging nothing against B., whose interests were identical with A.'s. Issues were made by C., which were tried and found for C. without any default of B. or pleadings by him, though he was served with process. In vacation, pending a motion by A. for

a new trial, B. filed a counter-claim praying a decree declaring the judgment satisfied.

*Held*, that B.'s counter-claim came too late to give him any standing in court or even to entitle him to apply for a change of venue from the judge, and that it was properly struck out.

*Held*, also, that A., having gone to trial without the default or answer of B., could not complain, having thereby waived such proceedings. *Ib.*

3. An injunction will not be granted to restrain the enforcement of a decision of a judicial tribunal of competent jurisdiction upon questions of fact. *Cicero* v. *Williamson*, *541*

INSANITY.

See CRIMINAL LAW, 1, 2; DECEDENTS' ESTATES, 6.

INSOLVENCY.

See VENDOR AND VENDEE, 1, 2.

INSTRUCTIONS TO JURY.

See CONTRACT, 1; CRIMINAL LAW, 4, 5; DECEDENTS' ESTATES, 5, 6; LANDLORD AND TENANT, 4; SALE, 2; SUPREME COURT, 15, 16, 22; VERDICT, 2.

1. *Statement of General Rules.—Exceptions.*—If a party desires that the exceptions to a general rule of law be stated in an instruction to a jury, he should, in general, ask the court so to do, but where the court states a legal proposition, and that the same is the rule "except in cases I shall hereafter enumerate," if the court afterwards undertakes to enumerate the exceptions, he must state them all, and for a failure so to do the judgment will be reversed. *Wells* v. *Morrison*, *51*

2. *Verdict.*—Where all the instructions given to the jury do not appear, there can be no reversal merely because it appears that the court instructed the jury to consider all the facts and render such a verdict as they should deem just and right. *Mitchell* v. *Tomlinson*, *167*

3. An instruction, so indefinite upon some point that it might mislead, is not error if another given is definite and correct upon the same point. *Cleveland, etc., R. W. Co.* v. *Bates*, *289*

4. *Credibility of Witnesses.*—It is an invasion of the province of the jury to instruct that it is their *duty* to consider the interest of a witness, his manner of testifying, the inconsistency of his statements, if any, and contradictory statements, if any, made by him in relation to the matter in question, in determining the credit to be given to his evidence. *Woollen* v. *Whitacre*, *502*

5. Where it has been demanded that the instructions to the jury shall be in writing, it is not error to say orally to the jury that "the plaintiff has requested some instructions, which are in writing, and I will read them first, and I read them as the law." *Dodd* v. *Moore*, *522*

6. *Same.—Witnesses.—Credibility.*—It is error to instruct that the weight to be given to the testimony of the plaintiff and defendant, as witnesses, depends upon the interest each may have in the result of the suit. *Ib.*

INSURANCE.

1. *Life Insurance.—Contract.—Civil Action.—Mandate.—Complaint.—Demand.*—In a suit upon a contract of life insurance, wherein the insurance association agrees to pay the beneficiary therein named a certain sum of money, upon the happening of certain contingencies, a complaint in an ordinary civil action affords an adequate and specific legal remedy, and, in such case, the beneficiary can not resort to a proceeding by mandate. Where the contract stipulates that proofs of death shall be furnished to the secretary of the association, the complaint is

sufficient if it show that such proofs were furnished to the association, and it is not necessary to aver therein a demand before suit brought. *Excelsior, etc., Ass'n* v. *Riddle*, 84

2. *Same.—Defence.—Fraudulent Concealment of Truth.—Reply.—Waiver of Forfeiture.*—Where, in such suit, the defence is that the party, whose life was insured, had falsely answered certain questions, and had fraudulently concealed the truth in answering other questions, in relation to his health and previous sickness, in his application for the policy of insurance sued upon, although the matters thus pleaded were such as avoided the contract of insurance, by its terms, yet, in legal effect, they merely rendered the contract voidable, at the election of the insurance company, and it was competent for the company to waive the forfeiture and continue the policy in full force. A reply of such waiver of forfeiture, alleging knowledge of all the facts stated in the answer, is a good reply to such a defence. *Ib.*

3. *Fire Insurance.—Cancellation of Policy.*—In a suit upon a fire policy containing a condition authorizing the underwriter to cancel the policy upon repayment of a ratable part of the premium, it was answered that this had been done before the fire; that the parties agreed upon $13 as the return premium, which had been paid and accepted. The evidence showed that a ratable part of the premium was $13.83, and there was a verdict for the plaintiff, though the evidence showed the agreement to receive and the payment of $13 as pleaded.

*Held*, that the answer was good, and a new trial should have been granted. *Ætna Ins. Co.* v. *Weissinger*, 297

INTENTION.

See FRAUD; WILL, 1.

INTERROGATORIES TO JURY.

See BILL OF EXCEPTIONS, 1; PRACTICE, 4; SUPREME COURT, 10; VERDICT, 2.

INTOXICATING LIQUOR.

1. *Sale Without License.—Defence.*—In a prosecution for an unlawful sale of intoxicating liquor, in a less quantity than a quart, the facts that the defendant had, prior to such sale, upon proper notice and after having given the bond required by the statute, obtained from the proper county board an order granting him license to sell such liquor in a less quantity than a quart at a time, for the term of one year, are not sufficient to constitute any defence, when it appears that the offence was committed and the indictment against him was returned before he had paid the requisite fee for, or taken out, his license. *Dudley* v. *State*, 317

2. *Sale on Sunday.—Indictment.—Time.*—An indictment for selling liquor on Sunday charged that the act occurred "on the 20th of June, 1883. * * Said 20th of June being the first day of the week, commonly called Sunday." The date given was Wednesday.

*Held*, that the indictment was good. *Roy* v. *State*, 417

JOINT RESOLUTIONS OF LEGISLATURE.

See CONSTITUTIONAL LAW, 3.

JUDGE.

See EVIDENCE, 2; SUPREME COURT, 20.

*Judge Pro Tem.—Appointment.—Supreme Court.—Presumption.*—Where no objection to a judge *pro tem.* was made in the court below, the Supreme Court will presume that his appointment was valid unless it affirmatively appears otherwise by the record. *Kenney* v. *Phillipy*, 511

## JUDGMENT.

See BANKRUPTCY; BASTARDY, 3; CRIMINAL LAW, 6, 12, 13; DECEDENTS' ESTATES, 2; DIVORCE; DRAINAGE, 1; EXECUTION, 3; HIGHWAY, 2, 5; INJUNCTION, 2, 3; MORTGAGE, 1; PARTITION, 2; PROMISSORY NOTE, 4; SUPREME COURT, 5; TOWN, 8; VENDOR AND VENDEE, 1, 2.

1. *When Void and Voidable.*—A judgment by a court of competent jurisdiction is not void in a legal sense unless the thing lacking or making it so is apparent upon the face of the record. If the infirmity do not so appear, the judgment is voidable but not void. *Earle* v. *Earle*, *27*

2. *Same.—Power of Courts to Set Aside.*—The power of courts to set aside judgments are not restricted by the statutory provisions in relation to the vacation of judgments to the causes and modes therein specified, to the exclusion of all other causes and modes; and courts may in a direct proceeding vacate and set aside judgments obtained by fraud upon the court, and may do so in decrees of divorce. *Ib.*

3. *Jurisdiction.—Justice of the Peace.*—A judgment of a justice of the peace, rendered on summons against a resident of another county, without notice or appearance, though the record shows service, is void for want of jurisdiction, and a suit to declare it void may be maintained. *Johnson* v. *Ramsay*, *189*

4. *Costs.—Transcript.—Lien.*—A general judgment for costs of the suit carries all costs accrued of the party in whose favor the judgment is rendered, as well as such costs afterwards accruing, whether an amount be specified in the judgment entry or not; and, when a transcript of such judgment is filed in the clerk's office of another county, and recorded and entered in the judgment docket as specified in sections 610, 611, R. S. 1881, the judgment becomes a lien on the debtor's lands in the latter county for the whole amount embraced therein, though such amount be in no manner specified. *Dufour* v. *Kious*, *409*
*Dufour* v. *Kious*, *474*

5. *Void and Voidable.*—A judgment by a court of competent jurisdiction is not void unless the thing lacking or making it so is apparent in the record. If the infirmity do not so appear the judgment is not void, but may be voidable. *Smith* v. *Hess*, *424*

6. *Same.—Delay of in Criminal Cases.*—Under section 1767, R. S. 1881, upon a plea of guilty, the court is not bound to pronounce judgment *eo instanti*, but may delay it for the purpose of hearing testimony as to aggravating or palliating circumstances. *Ib.*

7. *Same.—Collateral Attack.*—Where an appeal or other direct mode for the correction of errors in a judgment is provided, that mode must be pursued. *Ib.*

8. *Same.—Habeas Corpus.*—A judgment by a court of competent jurisdiction, valid on its face, is an unanswerable return to a writ of *habeas corpus* issued for the release of a person imprisoned by virtue of such judgment. *Ib.*

9. *Constitutional Law.—Legalizing or Curative Statutes.—Validating Unauthorized Judgments.—Act of March 2d, 1877.*—The General Assembly might provide by law before the rendition of judgment, that the written waiver by the defendant of the issue and service of a summons, and his written appearance in or to an action, endorsed on the complaint therein, should be equivalent to the issue and service of a summons on him in such action. This being so, the General Assembly may also provide by law, after the rendition of the judgment, that any judgment rendered in good faith, upon the written waiver by the defendant of the issue and service of a summons on him in the action, "shall be deemed legal and valid in all respects, the same as if a summons had been duly issued and served." Therefore the act of

March 2d, 1877, "legalizing certain judgments rendered without the formal service of process, and sales thereon," etc., (Acts 1877, Reg. Sess., p. 93), is not repugnant to any provision of the Constitution, and is a valid law. *Muncie Nat'l Bank* v. *Miller*, *441*

10. *Former Adjudication.— Mortgage.— Foreclosure.—Injunction.—Priority of Lien.*—U. was the equitable owner, by its terms, of a judgment which, standing in the name of N., was a lien upon lands of H., which H. afterwards mortgaged to W. To a suit by W. against H. to foreclose, U. was made a party defendant, and appeared and pleaded that the mortgage to W. was fraudulent, it being alleged against him that he held liens upon the lands *subsequent* to the mortgage: but he did not set up the judgment as a lien prior to W.'s mortgage. A trial by jury in 1876 resulted in a verdict for W., and a decree of foreclosure against all the defendants, including U., and under this decree W. purchased the lands, and at the proper time received a sheriff's deed. An execution upon the first named judgment was afterwards levied upon the lands, and B. H., the heir of W., then dead, brought suit against the sheriff and N., the nominal plaintiff in the judgment, to enjoin a sale under the execution.

*Held*, that the decree in favor of W. concluded U., and also N., from asserting the priority of the lien of the first named judgment, and that B. H. was, upon the facts stated, entitled to an injunction.
*Hose* v. *Allwein*, *497*

JUDICIAL SALE.

See DEED, 2; JUDGMENT, 10; STATUTE OF FRAUDS, 2; STATUTE OF LIMITATIONS, 3.

JURISDICTION.

See BASTARDY, 3; JUDGMENT, 3; TOWN, 1, 4 to 7.

JURY.

See CITY, 2; DRAINAGE, 2; INJUNCTION, 1; INSTRUCTIONS TO JURY; SUPREME COURT, 21.

JUSTICE OF THE PEACE.

See BASTARDY, 3; CRIMINAL LAW, 10 to 12; JUDGMENT, 3.

LANDLORD AND TENANT.

1. *Complaint to Recover Possession.—Damages.—Rent.—Lease.—Exhibits.—Demurrer.*—A complaint by a landlord against his tenant, who fails to pay rent, to recover possession and damages for unlawful detention, is not founded on the lease, and the lease, if made an exhibit, will not be examined on a demurrer to the complaint. *Whipple* v. *Shewalter*, *114*
2. *Same.—Description of Premises.—Evidence.*—A tenant can not escape payment of rent, according to the terms of the lease, for the time he occupied thereunder, upon the ground that the premises are not described in the lease as to their location; and such lease is admissible in evidence in an action for rent accrued to show the contract as to rent, and in an action for possession to show the amount of damages for detention after notice to quit; and evidence of the location of the premises corresponding to the description in the complaint is proper in such action. *Ib.*
3. *Same.—Notice to Quit.*—A notice to quit, from a landlord to a tenant, is sufficient if it apprise the latter as to what premises are demanded. *Ib.*
4. *Same.—Damages.—Instruction.*— When, in an action by a landlord against his tenant, unlawfully holding over after the termination of the tenancy, for possession and damages for unlawful detention, a claim for rent accrued is joined in the complaint, and the cause goes

to trial upon such complaint, it is not error, in instructing the jury as to the amount of recovery, to treat such joinder as proper. *Ib.*

5. *Damages.—Lease.—Complaint.—Parties.—Statute of Frauds.*—A complaint averred that the plaintiff leased a tract of land of W., who had put him in possession; that defendant had a prior lease of part of it which expired March 1st, 1881, and that he thereafter wrongfully and unlawfully kept the plaintiff out of possession, well knowing that he was entitled to the possession, and so used said part as to render it valueless for that year to plaintiff, to his damage.

*Held*, that the facts alleged constituted a cause of action.
*Held*, also, that W. was not a necessary party plaintiff or defendant.
*Held*, also, that the defendant could not invoke the statute of frauds against the plaintiff's lease. *Boyce* v. *Graham*, *420*

LAW MERCHANT.

See Promissory Note, 2, 6.

LEASE.

See Landlord and Tenant.

LEGISLATIVE APPROPRIATIONS.

See Constitutional Law.

LEGISLATURE.

See Constitutional Law; Judgment, 9.

LEX LOCI CONTRACTUS.

See Promissory Note, 15.

LIBRARY FUND.

See County Library.

LIEN.

See Chattel Mortgage; Decedents' Estates, 2; Deed, 7; Drainage, 3; Judgment, 4, 10; Vendor and Vendee, 1, 2.

LIFE-ESTATE.

See Partition, 2.

LIFE-INSURANCE.

See Insurance, 1, 2.

MANDAMUS.

See Insurance, 1; Railroad, 5, 6.

MARRIAGE.

See Trust and Trustee; Will, 2.

MARRIAGE BENEFIT COMPANY.

See Contract, 2.

MARRIED WOMAN.

See Partnership, 3.

1. *Mortgage.—Consideration.—Husband's Debts.—Foreclosure.*—That a wife, prior to 1879, mortgaged her lands without other consideration than to secure her husband's debt, is no defence to a suit against her to foreclose the mortgage. *Herron* v. *Herron*, *278*
2. *Common Law.—Act of March 25th, 1879.—Rule of Construction.—Contract*

*of Partnership.*—Under the common law, a married woman is incapable of binding herself by an executory contract, and all such contracts, whether in writing or by parol, are absolutely void at law. This was the law of this State until the act of March 25th, 1879, concerning married women, took effect and became the law; and while the provisions of this act were to be liberally construed, yet, as they were in derogation of the common law, they were not to be enlarged by construction beyond the plain meaning of the language used in the act. There is no sentence, clause, or section in the act of March 25th, 1879, which authorized a married woman to bind herself by a contract of copartnership with her husband or any other person, or to carry on any trade or business, or to perform any labor or service on the joint co-partnership account of herself and her husband, or any other person. *Haas* v. *Shaw*, 384

3. *Contract.—Promissory Note.*—Under the act of 1879, Acts 1879, p. 160, the promissory note of a married woman, given for money borrowed to carry on a business in which she was engaged on her own account, was valid. *Wallace* v. *Routley*, 586

MEASURE OF DAMAGES.

See PLEADING, 6; SALE, 2.

MENTAL INCAPACITY.

See CRIMINAL LAW, 1, 2; DECEDENTS' ESTATES, 6.

MINOR.

See CRIMINAL LAW, 3; DEED, 7; INFANT.

MISJOINDER OF CAUSES OF ACTION.

See LANDLORD AND TENANT, 4; SUPREME COURT, 11.

MISTAKE.

See DEED, 2.

MORTGAGE.

See CHATTEL MORTGAGE; COUNTY LIBRARY; JUDGMENT, 10; MARRIED WOMAN, 1; PROMISSORY NOTE, 12; SCHOOL FUND MORTGAGE; SHERIFF'S SALE, 2; VENDOR AND VENDEE.

1. *Foreclosure.—Sale.—Judgment.*—Where one has conveyed all his title to mortgaged real estate, in consideration that the grantee would pay the mortgage, and there has been a sale upon foreclosure satisfying the judgment, the grantor can not contest the validity of the decree ordering the sale. *Mescall* v. *Tully*, 96

2. *Deed.—Agreement.—Recording. — Title.—Equity.*—A., holding land by certificate of purchase from a commissioner appointed to sell, assigned the certificate to B., as security for a debt to B., with agreement that B. should take a deed in his own name and hold the title as security.

*Held*, that the transaction had the effect of a mortgage from A. to B., which the latter could foreclose against a grantee of a purchaser from the administrator of A.

*Held*, also, that an answer that the deed to B. was not recorded, and that without notice of the deed the defendant purchased, was bad on demurrer.

*Held*, also, that it is the legal title only, and not a mere equity, that is protected against a deed not recorded. *Combs* v. *Nelson*, 123

3. *Equity.—Foreclosure.*—A deed, in form absolute, if intended to be a mere security, is in equity a mortgage, and a suit to foreclose may be maintained upon it. *Herron* v. *Herron*, 278

4. *Foreclosure.—Grantee of Mortgagor.—Answer.—Evidence.—Burden of Is-*

*sue.—New Trial.*—Where suit is brought to foreclose a mortgage against the mortgagor and his grantees, and the grantees alone appear and allege, in their answer, that they are innocent purchasers, in good faith and for full value, of the mortgaged premises, and have fully paid the purchase-money, and that, in making such purchase, they relied upon the validity of a certain judgment quieting the mortgagor's title against the plaintiff in this suit, to which answer a reply in denial was filed.

*Held*, that the burden of the issue was on the defendants, and, as they introduced no evidence tending, even remotely, to prove any one of the facts stated in their answer, their motion for a new trial was correctly overruled. *Piper* v. *Force*, *373*

5. *Foreclosure.— Promissory Note. — Trial by Jury.—Constitutional Law.—Equity.*—In a suit on a note and mortgage, praying foreclosure, there is no constitutional right to a trial by jury. *Carmichael* v. *Adams*, *526*

## NEGLIGENCE.

See CITY, 2, 6; COMMON CARRIER; FRAUD; PROMISSORY NOTE, 1, 6, 7.

*Pleading.—Railroads.—Injury by Fire from Locomotive.*—A complaint to recover for property destroyed by fire negligently kindled on the defendant's premises and communicated to the plaintiff's adjoining property, which fails to aver that the defendant negligently suffered the fire to communicate to plaintiff's property, is bad on demurrer.
*Indiana, etc., R. W. Co.* v. *McBroom*, *111*

## NEGOTIABLE PAPER.

See PAYMENT, 1; PROMISSORY NOTE, 2.

## NEW TRIAL.

See BILL OF EXCEPTIONS, 3; CRIMINAL LAW, 8; DIVORCE, 2; MORTGAGE, 4; PARTITION, 1; SUPREME COURT, 13, 18.

1. *Surprise.—Evidence.—Statute Construed.*—A plaintiff, being at liberty to suffer a nonsuit, can not in any case obtain a new trial on the ground that he was surprised by the defendant's evidence, notwithstanding section 559, R. S. 1881, and this is clear where the evidence creating the surprise, though inadmissible, was suffered to go in without objection or any motion to strike it out. *Helm* v. *First Nat'l Bank*, *44*

2. *Transcript.*—A cause assigned for new trial appeared in the transcript thus: "The court erred in admitting in evidence the following executions, in these words, to wit: (These executions are inserted at full length on pages 69, 70, 75, 77. Clark W. Weesner, clerk.)" The reference in parenthesis was to a bill of exceptions made and filed long after the motion.

*Held*, that the motion presented no question to the court below.
*Burns* v. *Thompson*, *146*

3. *Motion.—Amount of Recovery.*—Where a motion for a new trial assigns as causes only that the verdict is contrary to law and is not supported by the evidence, no question as to the amount of the recovery is presented. *Millikan* v. *Patterson*, *515*

## NON-RESIDENT.

See COSTS.

## NOTICE.

See CITY, 1, 2; DEED, 7; DRAINAGE, 3; LANDLORD AND TENANT, 3; MORTGAGE, 2; SHERIFF'S SALE, 2; TOWN, 7, 8; VENDER AND VENDEE, 3.

## NUISANCE.

See CRIMINAL LAW, 4, 5.

## OFFICE AND OFFICER.

See CONSTITUTIONAL LAW, 3; COUNTY COMMISSIONERS; COUNTY LIBRARY; TOWN, 2; TOWNSHIP TRUSTEE.

1. *Information for Usurping Office.—Eligibility of Relator.*—An information for usurping an elective public office, filed on the relation of one claiming the office by election, is bad on demurrer, if it fail to show that such relator is eligible to the office. *State, ex rel.*, v. *Long*, 351

2. *Same.—County Recorder.—Term of Office.—Filling Vacancy by Appointment of One Who Had Theretofore Been Elected to Succeeding Term.—Statute Construed.*—A. was elected county recorder at the October election, held in 1878, to fill the four years term commencing November 1st, 1879, and ending November 1st, 1883. B.'s term of office of four years commenced November 1st, 1875, and ended November 1st, 1879; B. resigned November 4th, 1878, and A. was appointed to fill B.'s unexpired term. November 1st, 1879, A. entered upon the term for which he was elected. C. was elected as A.'s successor at the election held November 7th, 1882, and thereupon claimed that A.'s term of office commenced immediately upon the resignation of B., and expired at the end of four years from that date.

*Held*, that the resignation of B. created a vacancy, and that the appointment of A. to fill such vacancy did not alter the length of the term for which he was elected, commencing on the 1st day of November, 1879. *Ib.*

## OPEN AND CLOSE.

See DECEDENTS' ESTATES, 4.

## OWNERSHIP.

See EASEMENT, 2.

## PARENT AND CHILD.

See GUARDIAN AND WARD.

## PARTIES.

See CONTRACT, 4; LANDLORD AND TENANT, 5; PLEADING, 2, 3, 10; TOWN, 8; VENDOR AND VENDEE, 2; WILL, 2.

## PARTITION.

1. *New Trial.—Time of Making Motion.*—A motion for a new trial in partition, to be available, must be made during the term at which the finding was made or verdict rendered, except in special cases or by consent. R. S. 1881, sections 561, 1188. *Jones* v. *Jones*, 72
*Jones* v. *Jones*, 475

2. *Judgment.—Title.—Estate for Life.—Former Adjudication.*—A judgment in partition, assigning a share of the land to one for life, who is really seized of the share in fee simple, gives the share in fee simple, having the effect merely to part the land, without otherwise affecting the title, unless an issue had been made and directly decided as to the title. *Kenney* v. *Phillips*, 511

## PARTNERSHIP.

See DECEDENTS' ESTATES, 1; MARRIED WOMAN, 2.

1. *Receiver.*—It is only in exceptional cases that a receiver for a partnership will be appointed, unless a dissolution is about to occur or has occurred. *Barnes* v. *Jones*, 161

2. *Same.—Fraud.—Dissolution.—Complaint.*—A complaint, by a partner against his copartners, for a dissolution, which shows wilful acts of fraud by the defendants, the application by them of the partnership funds to their own uses, the making by them of false entries upon the books, the preventing of the plaintiff from having access to such books, and the wilful concealment from him of the condition of the

partnership business, is sufficient for that purpose, and, upon such a state of facts, a receiver may be appointed *pendente lite*. *Ib.*

3. *Married Woman.*—The provisions of the act of March 25th, 1879, Acts, 1879, p. 160, do not authorize a married woman to bind herself by a contract of copartnership. *Haas* v. *Shaw*, *384*

PAYMENT.

See CHATTEL MORTGAGE, 4; PROMISSORY NOTE, 12, 15; TAXES, 3.

1. *Smaller for Larger Sum Due.—Negotiable Instrument.*—In general, the payment of a smaller sum will not satisfy a larger, but a negotiable security for a smaller amount, given and accepted in satisfaction of a larger debt, will discharge it, and a check upon a bank, payable to bearer, is such a negotiable security. *Wells* v. *Morrison*, *51*

2. *Promissory Note.—Former Adjudication.—Decedents' Estates.*—In a suit by an administrator upon a note, it was pleaded and proved that the defendant had filed a larger claim against the estate, giving credit thereon for the money which was the consideration of the note, and recovered the balance of the claim, after deducting the credit, there having been no question as to the credit either by pleading or proof. *Held*, that this constituted a payment of the note. *Wallace* v. *Rowley*, *586*

PERSONAL PROPERTY.

See CHATTEL MORTGAGE; DECEDENTS' ESTATES, 5; EXECUTION; SALE.

PLEADING.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS, 9; CHATTEL MORTGAGE, 5; CITY, 3; CONTRACT, 1, 6; CRIMINAL LAW, 3, 5, 11; DECEDENTS' ESTATES, 7; DRAINAGE, 3; EXECUTION, 1, 3, 4; FRAUD; FRAUDULENT CONVEYANCE; GRAVEL ROAD, 1; INFANT; INJUNCTION, 2; INSURANCE; INTOXICATING LIQUOR, 2; LANDLORD AND TENANT, 1, 4, 5; MORTGAGE, 2, 4; NEGLIGENCE; PARTNERSHIP, 2; PRACTICE, 3; PROMISSORY NOTE, 4, 6, 14, 16 to 19; RAILROAD, 2, 5, 7; REAL ESTATE, ACTION TO RECOVER; STATUTE OF LIMITATIONS, 2; SUPREME COURT, 1, 17; TOWN, 8; VENDOR AND VENDEE, 1, 2.

1. *Complaint.—Construction.*—A complaint must proceed upon some definite theory, and must be construed with reference to that theory. *Mescall* v. *Tully*, *96*

2. *Complaint.—Demurrer.—Legal Capacity to Sue.*—A demurrer to a complaint, assigning as cause for demurrer, that the plaintiffs have not the legal capacity to sue, refers only to some legal disability of the plaintiffs, such as their infancy, idiocy or coverture, and not to the fact, if it be the fact, that the complaint fails to show a right of action in the plaintiffs. *Traylor* v. *Dykins*, *229*

3. *Same.—New Parties.—Amendment of Complaint.*—Where, in the progress of a suit, new parties are admitted as defendants, it is incumbent on the plaintiff to amend his complaint by inserting therein the names of such new parties, and by making proper averments concerning them. *Levi* v. *Engle*, *330*

4. *Reply.—Departure.— Demurrer.*— Where the reply is a departure in pleading, it is bad on demurrer for the want of sufficient facts. *Haas* v. *Shaw*, *384*

5. *Practice.—Harmless Error.*—Where a demurrer is erroneously overruled to an answer, and the complaint is thereafter amended, such ruling is thereby rendered harmless. *Conley* v. *Dibber*, *413*

6. *Demurrer.—Measure of Damages.*—If a complaint show the plaintiff entitled to damages, it is good against a demurrer, and the measure of damages can not be settled by the demurrer. *Boyce* v. *Graham*, *420*

7. *Same.—Striking Out.*—The general denial, and a special paragraph embracing only matter admissible under the denial, being pleaded, the special paragraph should be struck out on motion. *Ib.*

8. *Demurrer.—Error.—Practice.*—A demurrer to a paragraph of answer, all the facts in which are available under another paragraph, searches the record, and should be sustained to a bad complaint; and if the complaint be bad it is error to sustain it to the paragraph of answer. *Eve* v. *Louis*, *457*

9. *Failure to Require Reply.*—Where a defendant goes to trial without requiring a reply to his answer, its allegations will be regarded as controverted by a general denial. *Hose* v. *Allwein*, *497*

10. *Pleading.—Demurrer.—Incapacity to Sue.—Defect of Parties.*—A demurrer to a complaint, assigning as cause that the plaintiff has not legal capacity to sue, has reference only to some legal disability of the plaintiff, such as infancy, idiocy or coverture; and where a defect of parties is the cause assigned, the demurrer must specifically point out and name those who should have been, but were not, made parties. *Dewey* v. *State, ex rel.*, *173*

11. *Fraud.*—The use of epithets in a pleading is not sufficient to show fraud, but the facts constituting the fraud must be distinctly averred. An intention to deceive must appear, and that in reliance upon the facts, with the use of ordinary care, they were acted upon in good faith and the deception accomplished, to the prejudice of the other party. *Hardy* v. *Brier*, *91*

## POSSESSION.

See CHATTEL MORTGAGE, 3; DEED, 2; PROMISSORY NOTE, 16; STATUTE OF LIMITATIONS, 3; VENDOR AND VENDEE, 3.

## PRACTICE.

See ASSIGNMENT OF ERROR; BASTARDY, 3; BILL OF EXCEPTIONS; COSTS; CRIMINAL LAW, 6 to 9; DECEDENTS' ESTATES, 3, 4, 9; DIVORCE, 2; EXECUTION, 1; HIGHWAY, 2, 4, 5; INJUNCTION, 2; INSTRUCTIONS TO JURY; LANDLORD AND TENANT, 4; NEW TRIAL; PARTITION, 1; PLEADING, 1, 2, 3, 5, 7 to 10; PROMISSORY NOTE, 9; SUPREME COURT; VERDICT.

1. *Removal of Cause to U. S. Court.*—Without a bond conditioned as required by the act of Congress, a cause can not be removed from a State court to the U. S. Circuit Court. *Combs* v. *Nelson*, *123*

2. *Amending Complaint After Issue Joined.—Affidavit.—Evidence.—Discretion of Court.—Presumption.*—It is within the discretion of the trial court to allow the plaintiff to amend his complaint, after the cause is at issue and set for trial; and, unless the contrary is shown by affidavit or other proof, it will be presumed by the Supreme Court that the defendant was not prejudiced by the amendment. *Dewey* v. *State, ex rel.*, *173*

3. *Harmless Error.—Pleading.*—Demurrers to several paragraphs of a complaint were overruled, the issues on which were all afterwards found for the defendant; but there was a finding for the plaintiff and judgment upon another paragraph.

*Held*, that the rulings upon the demurrers were harmless. *Johnson* v. *Ramsay*, *189*

4. *Interrogatory to Jury.—Error.—Verdict.*—There is no error in the court's refusal to propound an interrogatory to the jury, at the request of a party, when such request is absolute and unconditional, and not in the event they render a general verdict. *Taylor* v. *Burk*, *252*

5. *Striking out Paragraph of Answer.—Harmless Error.*—It is a harmless error to strike out a paragraph of answer, when all the facts admissible thereunder may be proved under the general denial which is filed. *Board, etc.*, v. *Huff*, *333*

## PRESUMPTION.

See BILL OF EXCEPTIONS, 11; CITY, 2; DECEDENTS' ESTATES, 2; JUDGE; PRACTICE, 2; PROMISSORY NOTE, 15; RAILROAD, 3; SUPREME COURT, 15.

## PRINCIPAL AND AGENT.

See CONTRACT, 3; DEED, 6; EVIDENCE, 8, 9.

1. *Letters.—Evidence.*—Letters written by an agent in reference to the matter in controversy are legitimate evidence against his principal, in favor of the adverse party. *Wells* v. *Morrison, 51*
2. *Statements of Agent.*—The statements of an agent while acting as such, concerning the matter in which he is acting as agent, are admissible in evidence against his principal. *Burns* v. *Thompson, 146*

## PRINCIPAL AND SURETY.

See CHATTEL MORTGAGE, 2 to 5; PROMISSORY NOTE, 10; STATUTE OF FRAUDS, 1.

## PRIVATE WAY.

See HIGHWAY, 1, 2.

## PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION, 1, 2.

## PROMISSORY NOTE.

See CHATTEL MORTGAGE, 4; MARRIED WOMAN, 3; MORTGAGE, 5; PAYMENT, 2; SALE, 2; VENDOR AND VENDEE, 2.

1. *Cancellation.—Forged Instrument.—Equity Jurisdiction.—Fraud.—Want of Consideration.—Negligence.*—A court of equity has jurisdiction to compel the cancellation of a forged instrument. So, also, of a promissory note procured by fraud; but not where the maker has been led to execute it by his own inexcusable negligence or folly, nor where it is merely without consideration. *Hardy* v. *Brier, 91*
2. *Same.—Law Merchant.—Banks.*—A note payable at the bank at A. in this State, though there be only one bank there, it being a bank of discount and deposit, is not by our statute negotiable according to the law merchant. *Ib.*
3. *Execution.—Evidence.*—Proof that a note has frequently been presented to the maker, that he made one payment upon it, often promised to pay the balance and never questioned its genuineness, is, in the absence of countervailing evidence, sufficient proof of its execution. *Warren* v. *Able, 107*
4. *Assignor and Assignee.—Pleading.—Consideration.—Judgment.*—A complaint against the assignor of a note by mere delivery, alleging that the maker defeated a suit against him by the plea of infancy, is bad: 1. For failure to aver the consideration for the assignment; 2. Because the assignor is not bound by the judgment unless he was a party to the suit, or had proper notice thereof. *Brown* v. *Summers, 151*
5. *Same.—Endorsement.—Evidence.*—In a suit upon the endorsement of a note there was an answer that the endorsement was without consideration.

*Held*, that evidence for the defendant concerning the consideration was admissible. *Ib.*

6. *Endorser and Endorsee.—Law Merchant.—Fraud.—Negligence.—Answer.—Consideration.*—To a suit by the endorsee, against the maker, of a note payable at a bank in this State, an answer showing by proper averments that the note was without consideration, and the execution thereof obtained by fraud while the defendant was so under the influ-

ence of medicines administered by the person who received the note that he was incapable of comprehending the nature of the transaction, is good on demurrer. So, also, an answer that the note was without consideration and was obtained by fraud, properly alleged, and that the plaintiff and prior endorsees had notice thereof before taking the note. *Mitchell* v. *Tomlinson*, 167

7. *Same.—Note Procured by Fraud.—Bona Fide Purchaser.*—Where a promissory note governed by the law merchant, is procured by fraud and without consideration of one who, without negligence, signs it under the belief that he is executing a contract of agency, the maker is not liable even to a *bona fide* purchaser. *Ib.*

8. *Same.—Burden of Proof.*—Where, in a suit by the endorsee against the maker of a note payable at a bank in this State, the defendant shows that the note was procured by fraud, the burden is on the plaintiff to show that he is a *bona fide* holder, for value, by endorsement before maturity, in the regular course of business. *Ib.*

9. *Same.—Party as Witness.—Cross-Examination.*—Where a plaintiff submits himself as a witness to prove that he took innocently commercial paper shown to have been procured by fraud and without consideration, considerable latitude should be allowed in his cross-examination. *Ib.*

10. *Principal and Surety.—Former Adjudication.—Surety.—Contribution.*—In a suit against three on a promissory note, two of whom are sureties, an answer to the complaint by one that he is liable only as surety, and a judgment accordingly, and that the property of the other two be first exhausted, is not an adjudication which binds the other surety so as to bar a suit by him against his co-surety for contribution. *Leaman* v. *Sample*, 236

11. *Indorsement.—Assignor and Assignee.—Forgery.*—A forged assignment of a promissory note by the payee gives no right to a subsequent assignee as against the payee, though he be a *bona fide* holder for value. *Citizens State Bank* v. *Adams*, 280

12. *Mortgage.—Joint Obligors.—Release of One.—Payment.*—W. and L. were joint makers of a note secured by a mortgage on lands executed by W. and wife, which contained a covenant by the mortgagors to pay "the sum of money" mentioned in the note. L., on payment of a small part of the note, was entirely released.

*Held*, that W. and wife were not thereby released from their covenant to pay, contained in the mortgage. *Walls* v. *Baird*, 429

13. *Assignor and Assignee.—Assignment.*—The assignment by one of two holders of a note of his half to the other is a good assignment in equity. *Fordyce* v. *Nelson*, 447

14. *Same.—Pleading.—Endorsement.*—A complaint by an assignee against the maker of a promissory note need not exhibit a copy of the endorsement. *Ib.*

15. *Same.—Lex Loci Contractus.—Place of Payment.—Presumption.*—A note payable in another State, but made in this State, is presumed to be made with reference to the laws of that State, and its effect will depend on such laws. *Ib.*

16. *Execution.—Delivery.—Possession.—Complaint.*—In a complaint upon a promissory note alleged to have been executed by the defendant and to be in his possession, it is not necessary to also allege that he delivered the note. *Keesling* v. *Watson*, 578

17. *Same.—Excuse for Failure to File Copy as Exhibit.—Fraud.*—In such case the averment that the defendant has possession of the note is a sufficient excuse for failing to file the note or a copy of it with the complaint; nor was it necessary to allege that one S., in whose

custody the note was, and from whom it was alleged the defendant fraudulently procured the note, was the plaintiff's agent, as the *onus* of showing that the plaintiff had parted with the note was on the defendant. *Ib.*

18. *Same.—Consideration.*—In a suit on a note, it is not necessary to aver a consideration as the note imports it. *Ib.*

19. *Same.—Evidence.—Statements.—Res Gestæ.*—Where, in such case, the defendant obtained from S., who had the custody of such note, its possession by virtue of an order which purported to have been executed by the decedent, he can not prove by S. what he said to S. at the time he obtained the note, about the decedent having executed such order. These statements were not a part of the *res gestæ*, and as they were made by himself, they were inadmissible. *Ib.*

PUBLIC SQUARE.

1. *Definition.*—A public square in a county seat is understood to be the ground upon which the court-house and other public buildings are situated. *Board, etc.*, v. *Huff, 333*

2. *Same.—Public Highway or Street Across Public Square.—Easement.—Dedication.—User.—Power of County Commissioners.*—Although land be set aside for a public square, the public may acquire a highway across such land by dedication, or by user for 20 years. The county commissioners may make such dedication. (As to what facts show the acquisition of such a public highway, see opinion.) *Ib.*

3. *Same.—Use of Such Way as Water-Way.*—The use of such a way as a water-way, if not incompatible with its use as a highway, will not operate to prevent the acquisition of the way by user as a highway. *Ib.*

QUESTION OF FACT.

See DECEDENTS' ESTATES, 4; TOWN, 9.

QUESTION RESERVED.

See CRIMINAL LAW, 6.

QUIETING TITLE.

See REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE, 2; STATUTE OF LIMITATIONS, 3.

QUO WARRANTO.

See OFFICE AND OFFICER, 1.

RAILROAD.

See NEGLIGENCE.

1. *Highway Crossings.—Duty of Railroad Company.—Construction of Statute.*—Under a fair construction of section 3903, R. S. 1881, it is the duty of a railroad company to construct its road, where it intersects any public highway, in such manner as to afford security for life and property; and this is so, whether the highway is laid out and opened before or after the construction of the railroad.
*Louisville, etc., R. W. Co.* v. *Smith, 119*

2. *Killing Stock.—Fencing.—Complaint.—Demurrer.*—In an action against a railroad for killing stock, the complaint alleged that the defendant, while running its cars over the road, at a place where their road was not securely fenced, ran over and killed certain stock; that at the place where such stock entered on the defendant's road was not at the crossing of any public highway or in the corporate limits of any city or town, but was at a place where the company was required by law to fence and could have fenced. On demurrer,

*Held*, that the complaint did not aver that the road was not fenced securely at the place where the stock entered. *Louisville, etc., R. W. Co.* v. *Quade*, 295

3. *Same.—Presumption of Law.*—If the place at which the stock entered was one which the road was required to fence and was capable of being fenced, as alleged, the presumption is that the company had done its duty in regard to fencing it. *Ib.*

4. *Public Aid.—Taxes.—Statute Construed.*—Section 4062, R. S. 1881, so far as it provides for a forfeiture of taxes levied to aid in the construction of railroads, has been repealed. *Caffyn* v. *State, ex rel.*, 324

5. *Same.—Mandate.—Pleading.*—In an alternative writ of mandate to compel the auditor to place on the duplicate taxes levied in aid of a railroad, it is sufficient to aver as a fact that the railroad has been permanently located in the township, without alleging that the fact has been judicially determined. *Ib.*

6. *Same.—Evidence.—Records.—Maps.—Corporation.*—A proper record of a county board, appropriating money to aid a railroad company named therein, and showing all the facts necessary to give jurisdiction, is sufficient evidence of the appropriation and of the corporate existence of the railroad company, in a proceeding by mandate to have the tax put upon the duplicate. So, that the railroad has been permanently located is sufficiently shown by the map and profile filed in the clerk's office, with proof of the actual construction of the road accordingly. *Ib.*

7. *Killing Stock.—Complaint.*—A complaint before a justice of the peace, under the statute, R. S. 1881, section 4025, to recover the value of a mare, which, with the other necessary allegations, avers that "where said mare entered upon said defendant's railway and was killed, said railway was not fenced at all," is sufficient on demurrer. *Louisville, etc., R. W. Co.* v. *Detrick*, 519

8. *Same.—Evidence.—Value.—Identification.*—In a suit to recover the value of an animal killed by the defendant, evidence of the value of the animal a month before the killing is admissible, though the witness can identify the animal only as one belonging to the plaintiff, *said* to have been killed. *Ib.*

9. *Conveyance.—Condition Subsequent.—Right of Way.—Title.—Statute Construed.*—The 21st section of the charter of the Indianapolis and Bellefontaine Railroad Company does not give to a conveyance of the *right of way* upon a condition subsequent the effect of a conveyance of land in fee simple absolute. *Cleveland, etc., R. W. Co.* v. *Coburn*, 557

10. *Same.—Breach of Condition in Deed.—Consideration.—Abandonment.—Release.*—A conveyance to a railroad company of the right of way for its road, the consideration of which is shown to be the construction and permanent maintenance of the road upon the line so granted, and the erection and maintenance of its depot upon adjoining lands, is upon condition subsequent, and if such depot and track be afterwards abandoned, it is a breach of the condition, which defeats the grant. And if, upon such abandonment, the grantor, for a valuable consideration from the railroad company, grant the right of way to another person and release the company of all damages and rights of action by reason of the removal of the depot, no title to the land will be or remain in the railroad company. *Ib.*

## REAL ESTATE.

See CONTRACT, 3; DECEDENTS' ESTATES, 2, 7, 8; DEED; DESCENTS; EASEMENT; EXECUTION, 2; FRAUDULENT CONVEYANCE; JUDGMENT, 4, 10; LANDLORD AND TENANT; MORTGAGE; PARTITION; RAILROAD, 9, 10; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE; STATUTE OF FRAUDS, 2; STATUTE OF LIMITATIONS, 3; TAXES; TRUST AND TRUSTEE; VENDOR AND VENDEE; WILL, 1.

REAL ESTATE, ACTION TO RECOVER.

See LANDLORD AND TENANT, 1 to 4.

1. *Counter-Claim.—Quieting Title.*—To a suit for possession of lands and to quiet title, the defendant may by way of counter-claim set up a title in equity in himself, and pray to have his title quieted.
*Barnes* v. *Union School Tp.*, *301*

2. *Pleading.—Recovery of Real Estate.—Complaint.—Demurrer.*—In an action to recover the possession of real estate, the complaint is insufficient on demurrer, under sec. 1054, R. S. 1881, if it fails to show that the defendant unlawfully keeps the plaintiff out of possession. *Levi* v. *Engle*, *330*

3. *Complaint.*—Section 1054, R. S. 1881, requires that a complaint in ejectment shall state that the plaintiff is entitled to possession of the premises, and that the defendant unlawfully keeps him out, but it is not necessary to use the exact words of the statute. *Swaynie* v. *Vess*, *584*

RECEIPT.

See ATTORNEY AND CLIENT, 1, 2.

RECEIVER.

See BILL OF EXCEPTIONS, 5; PARTNERSHIP.

RECOGNIZANCE.

See CRIMINAL LAW, 10, 11.

RECORD.

See BILL OF EXCEPTIONS; CRIMINAL LAW, 6, 7, 9; JUDGMENT, 3; RAILROAD, 6; SHERIFF'S SALE, 2; SUPREME COURT, 2, 15, 17, 20 to 22.

REDEMPTION.

See STATUTE OF FRAUDS, 2.

RELEASE.

See PROMISSORY NOTE, 12; VENDOR AND VENDEE, 4.

RENT.

See LANDLORD AND TENANT.

REPEAL OF STATUTE.

See RAILROAD, 4.

RES ADJUDICATA.

See JUDGMENT, 10; PARTITION, 2; PAYMENT, 2; PROMISSORY NOTE, 10.

RESCISSION.

See DEED, 3, 7.

RES GESTÆ.

See DEED, 5; PROMISSORY NOTE, 19.

REVERSION.

See DESCENTS.

REVIEW OF JUDGMENT.

See DIVORCE.

RULE OF COURT.

See BILL OF EXCEPTIONS, 4.

SALE.

See CHATTEL MORTGAGE, 2, 3; DEED, 2; INTOXICATING LIQUOR; MORTGAGE, 1; SHERIFF'S SALE; STATUTE OF FRAUDS; VENDOR AND VENDEE, 1.

1. *Good-Will.—Incident to Locality or Place.—Stock of Merchandise.*—Good-will, as property, is intangible, and merely an incident of other property. As a general rule, it is not an incident of a stock of merchandise, but of locality or place, of the store-room or place of business.
*Rawson* v. *Pratt*, 9

2. *Same.—Amount of Annual Sales.—False Representations.—Sufficiency of Counter-Claim.—Measure of Damages.—Instructions.*—In a suit upon certain promissory notes, the defendants, admitting the execution of the notes, alleged, by way of counter-claim, that they were given in consideration of the sale to the defendants by the plaintiffs of their stock of merchandise and of the good-will of the trade and business in which they were then engaged; that to induce the defendants to make such purchase, the plaintiffs represented that their annual sales, in such trade and business, were then and there $30,000; that the defendants relied upon these representations and were induced thereby, as the plaintiffs well knew, to make such purchase; that the representations were false and known so to be by the plaintiffs at the time, and were by them made for the purpose of cheating and defrauding the defendants in the premises; and that the sales of the plaintiffs in such trade and business were, in truth, only $15,000 per year. The defendants did not aver that they had purchased or procured from the plaintiffs any right or title to, or interest in, their store-room or place of business, or that the plaintiffs owned or controlled, or had any possessory right or interest in such store-room or place of business; but they alleged that they had obtained, as the plaintiffs well knew, a lease for one year of the store-room or place of business, theretofore occupied by the plaintiffs. Upon evidence tending to establish the foregoing facts:
*Held*, that the trial court did not err in instructing the jury that the measure of the defendants' damages, if any, in respect to the good-will of the plaintiffs' trade or business, was the difference between the rental value of a store-room, where the annual sales in such trade or business amounted to $30,000, and of a store-room or place of business where such annual sales were only $15,000.
*Held*, also, that the defendants' counter-claim was bad on demurrer, because it failed to allege that they had carried on any business, for any period of time, in the store-room previously occupied by the plaintiffs, or in any other place, or that the annual sales of the defendants had not been $30,000, or even more. *Ib.*

## SCHOOL FUND MORTGAGE.

See VENDOR AND VENDEE, 4.

*Release of.—County Auditor.—Encumbrance.*—The auditor of a county has no authority to release a school mortgage unless the money is paid, and where a party is entitled by his contract to an unencumbered title he is not compelled to accept a conveyance of land thus encumbered, though the auditor has released the mortgage of record.
*Conley* v. *Dibber*, 413

## SHERIFF'S SALE.

See CHATTEL MORTGAGE, 2 to 5; DEED, 2; FRAUDULENT CONVEYANCE; JUDGMENT, 10; STATUTE OF FRAUDS, 2; STATUTE OF LIMITATIONS, 3.

1. *Execution.—Exemption.*—Where an execution defendant claims real estate as exempt from execution in the manner required by statute, the sheriff can not make a valid sale thereof, by disregarding the claim of exemption and neglecting to have an appraisement of the property claimed as exempt, nor will the fact that perjury was committed in swearing to a false schedule give validity to such sale.
*Over* v. *Shannon*, 99

2. *Fraudulent Conveyance.—Mortgage.—Notice.—Execution Docket.—Quieting Title.*—A judgment creditor became the purchaser, on execution, of lands fraudulently conveyed by the debtor; proper return of the execution was made, and the return recorded in the execution docket as the statute requires. R. S. 1881, section 677. Before the time for redemption had expired, the person holding the legal title mortgaged the lands for a loan of money, the mortgagee having no actual notice of the fact that the conveyance to the mortgagor was made to defraud creditors.

*Held*, that the record upon the execution docket was constructive notice to the mortgagee.

*Held*, also, that after obtaining a proper sheriff's deed the judgment plaintiff could maintain a suit against the mortgagee to quiet title.

*Sanders* v. *Muegge, 214*

3. *Real Estate.—Written Memorandum.—Rights of Purchaser.*—Where, upon proper notice of the time and place of sale, the sheriff offers and sells, according to law, a tract of land to the highest and best bidder for a reasonable price, and at the time makes a written memorandum of such sale, the purchaser will be entitled, upon payment or tender of the amount of his bid, to the sheriff's certificate of such sale, and, at the proper time, if there be no redemption from the sale, to the sheriff's deed of such real estate. *Brake* v. *Brownlee, 359*

4. *Same.—Sale in Parcels.—Sale in Solido.*—On a sale of real estate by a sheriff, upon execution or order of sale, if such real estate consist of two or more lots, tracts, or parcels, it is the imperative duty of the sheriff to offer each of them separately; and if he receive a fair and reasonable bid for a single lot, tract, or parcel, when separately offered, it is also his duty to separately sell the same to such bidder, although the amount of the bid be not sufficient to satisfy the execution or order of sale. In such case, the fact that the sale of all the lots, tracts, or parcels, may be necessary to satisfy the execution or order of sale, will not authorize the sheriff to sell the same *in solido*. *Ib.*

SPECIAL VERDICT.

See VERDICT.

STREET.

See CITY, 3, 6; PUBLIC SQUARE, 2, 3.

STATUTE CONSTRUED.

See CONTRACT, 4; CRIMINAL LAW, 1, 3, 7, 8, 10, 12, 13; DECEDENTS' ESTATES, 2, 3, 8; DEED, 6; DRAINAGE, 1; EVIDENCE, 10; HIGHWAY, 6; JUDGMENT, 9; MARRIED WOMAN, 2, 3; NEW TRIAL, 1; OFFICE AND OFFICER, 2; RAILROAD, 1, 4, 9; STATUTE OF LIMITATIONS, 3; SUPREME COURT, 4, 22; TAXES, 3, 4; TOWN, 2, 3.

STATUTE OF FRAUDS.

See LANDLORD AND TENANT, 5; TRUST AND TRUSTEE; VENDOR AND VENDEE, 3.

1. *Agreement.—Parol Joint Contract for Benefit of One.—Principal and Surety.*—A., who was a retail dealer, with B., his friend, agreed, by parol, with a wholesale dealer, for the purchase of goods for A. on credit, to be charged to A. and B. jointly.

*Held*, that the agreement of B. was original and not collateral, and was not within the statute of frauds. *Boyce* v. *Murphy, 1*

2. *Contract.—Agreement to Extend Time for Redemption of Land Sold on Execution.*—A., who had arranged for an assignment to himself of a sheriff's certificate of purchase of the lands of B., agreed by parol with B. to give six years to redeem, acting on the faith of which B. did not redeem within the year, as he could and otherwise would have done. A.

took a sheriff's deed at the end of the year allowed for redemption, and then refused to perform his agreement, and claimed title and took possession, whereupon B. brought suit to redeem.

*Held*, that the contract between A. and B. was not within the statute of frauds, and B. had a right to redeem. *Butt* v. *Butt*, 305

STATUTE OF LIMITATIONS.

See ATTORNEY AND CLIENT, 4.

1. *Guardian and Ward.—Demand.*—When a ward reaches full age, money in the hands of his guardian is due without demand, and the statute of limitations, which is six years, then begins to run. *Jones* v. *Jones*, 373

2. *Counter-Claim.—Pleading.*—In pleading the statute of limitations to a counter-claim it must be shown that the bar of the statute had matured when the original suit was commenced, and it is not sufficient to aver a bar when the counter-claim was filed. *Eve* v. *Louis*, 457

3. *Same.—Quieting Title.—Sheriff's Sale.—Fraudulent Conveyance.*—A suit to quiet title by a purchaser at sheriff's sale, as against a fraudulent conveyance by the judgment debtor, is not a suit for relief against fraud in the sense of section 292, R. S. 1881, and the bar is not six years, but is fifteen years, if he be in possession; and if out of possession he could, at any time within twenty years from the time his right of possession accrued, quiet his title against any invalid adverse claim asserted at or within fifteen years before the commencement of his suit. *Ib.*

4. *Attorney.*—A suit to enforce the liability of an attorney upon one not an attorney, who agrees in writing to collect a claim, upon the ground that he orally represented himself to be an attorney is not upon a contract partly by parol, and is not barred by the limitation of six years. *Foulks* v. *Falls*, 315

SUMMONS.

See JUDGMENT, 3, 9.

*Service of.*—The time of the service of a summons is to be computed by excluding the day of service and including the return day, and, therefore, service on the 5th day of the month for the 15th is sufficient ten days' personal service under section 516, R. S. 1881. *Reigelsberger* v. *Stapp*, 311

SUNDAY.

See INTOXICATING LIQUOR, 2.

SUPREME COURT.

See ASSIGNMENT OF ERROR; BASTARDY, 3; BILL OF EXCEPTIONS; CRIMINAL LAW, 6, 7; DECEDENTS' ESTATES, 3, 9; HIGHWAY, 2; INSTRUCTIONS TO JURY, 2; JUDGE; PRACTICE, 2.

1. *Pleading.—Right Judgment.—Intervening Errors.*—Where it appears that, upon the statements in the pleadings, the right judgment has been rendered, it will not be reversed by the Supreme Court for intervening errors. *Rawson* v. *Pratt*, 9

2. *Practice.—Certification of Record on Appeal Where there has been Change of Venue.*—A complaint in two paragraphs was filed in the Ohio Circuit Court; demurrer overruled to the second; thereupon a change of venue was taken to the Dearborn Circuit Court, where the cause was put at issue, tried, and verdict and judgment rendered for the plaintiff; defendant appealed; the record was made out by the clerk of the D. C. C. pursuant to the written instructions of appellant, under section 649, R. S. 1881; the record does not contain the certificate of the clerk of the O. C. C., which was appended to the transcript filed in the D. C. C. on change of venue, nor did appellant's written direction instruct the clerk of the D. C. C. to certify such transcript from the O. C. C., nor does the clerk of the D. C. C. certify that the record sent up con-

tains a transcript from the O. C. C. On petition by appellee for a rehearing,in which it is objected that the ruling of the O. C. C. on the demurrer was not before the Supreme Court.

*Held*, that it was not necessary, in the written instruction to the clerk of the D. C. C., to designate those portions of the record as being parts of the transcript from the O. C. C.

*Held*, also, that appellee can not be permitted to say in the Supreme Court, for the purpose of maintaining his judgment rendered by the D. C. C., on change of venue, that there was no change of venue, without which change his judgment could not stand. *Powell* v. *Bunger*, 64

3. *Evidence.*—As to what evidence will be sufficient to support a verdict in the Supreme Court, see opinion. *Mullaney* v. *Indiana Nat'l Bank*, 77

4. *Constitutional Law. – Construction of Statute.*—When the constitutionality of a statute is called in question, it is the uniform rule of the Supreme Court to construe and interpret its provisions, if possible, so as to sustain and not defeat the law; and even where the constitutionality of the law seems to be doubtful, the doubt will be solved in favor of its constitutionality. *Hays* v. *Tippy*, 102

5. *Modification of Judgment.—Bill of Exceptions.*—The overruling of a motion to modify a judgment will not be reviewed by the Supreme Court, unless the reasons, which were given in support of the motion, are shown by bill of exceptions. *Whipple* v. *Shewalter*, 114

6. *Weight of Evidence.*—Where there is evidence in the record tending to sustain the verdict on every material point, the Supreme Court will not reverse the judgment on the weight of the evidence. *Louisville, etc., R. W. Co.* v. *Smith*, 119

7. *Same.—Questions to Witness.—Objection and Exception.—Exclusion of Evidence.—Error.*—The error of the court, if such it be, in sustaining an objection to a question to a witness, though an exception be saved to the ruling, is not an available error in the Supreme Court for the reversal of the judgment, unless it appear from the record that the party informed the trial court at the time what evidence he expected to elicit by the answer to the question, and that the court erred in the exclusion of such evidence. *Ib.*

8. *Witness.*—That a party was not permitted to put certain questions to a witness is not available as error in the Supreme Court, where it does not appear that the lower court was informed of the facts expected to be elicited. *Burns* v. *Thompson*, 146

9. *Practice.—Harmless Error.—Evidence.*—A judgment will not be reversed by the Supreme Court, for an error in sustaining a demurrer to a paragraph of answer, when it appears that all the evidence, admissible under such paragraph, is also admissible under another paragraph of answer remaining in the record. Such an error is a harmless one. *Traylor* v. *Dykins*, 229

10. *Harmless Error.—Interrogatories to Jury.*—The general denial and special defences were pleaded, and it appeared by answers of the jury to interrogatories, that upon the trial there was an utter failure to prove the truth of the complaint, and that there was no motion for a new trial.

*Held*, that the Supreme Court could not reverse because of error in overruling demurrer to the special paragraphs of the answer, the errors being harmless. *Burgett* v. *Teal*, 260

11. *Misjoinder.—Error.*—By express statute, R. S. 1881, section 341, a misjoinder of causes of action can never be available error on appeal. *Herron* v. *Herron*, 278

12. *Amendments.—Discretion.*—The refusal of the court to permit amendment of pleadings after issues have been formed will not be reviewed

by the Supreme Court, save when it appears that there has been an abuse of discretion. *Citizens, etc., Bank* v. *Adams*, 280

13. *Practice.—Evidence.—New Trial.*—Without a motion for a new trial, the action of the court in disregarding certain evidence is not presented. *Patterson* v. *State, ex rel.*, 364

14. *Verdict.—Weight of Evidence.*—Where the evidence tends to establish the material averments of a good complaint, the Supreme Court will not disturb the verdict on the weight of the evidence. *Indianapolis* v. *Murphy*, 382

15. *Practice.—Instructions.—Presumption.*—Where the error assigned is the refusal of the court to give certain instructions asked by appellant, and the record does not contain general instructions, the presumption on appeal is that the court did its duty under the code (section 533, R. S. 1881), and gave general instructions covering the issues in the case. *Ib.*

16. *Same.—Failure to Object to Refusal to Give Instructions.*—Where no objection or exception is taken to the refusal to give instructions asked, no question is presented on such refusal in the Supreme Court. *Ib.*

17. *Appeal.—Plea in Bar.—Demurrer.—Estoppel by Record.—Estoppel in Pais. —Two Actions for Same Cause.*—A plea in bar of an appeal set forth, that before the commencement of the action in which the judgment was rendered from which the appeal was taken, the appellant had appropriated land for the use of a railway corporation; that an appraisement was made according to law; that exceptions were filed to the appraisement; that trial was had in the A. Circuit Court and judgment rendered for appellee's testator in a sum in excess of the appraisement; that the case was appealed to the Supreme Court and the judgment reversed; that after the reversal the venue was changed to W. county, where appellant, over appellee's objection, dismissed the condemnation proceedings; that thereupon appellee instituted this action in the superior court of A. county, and recovered the judgment from which this appeal is prosecuted, that an appeal was taken by appellee from the order dismissing the condemnation proceedings; that after the appeal of appellee had been perfected, the appellant, in the present case, filed a plea in bar of appellee's appeal, alleging therein the recovery of the judgment in this cause; that it was for the same cause of action involved in the condemnation proceedings; that this plea of appellant was held good on demurrer, and, appellee failing to reply, the Supreme Court gave appellant judgment on demurrer and dismissed the appeal.
*Held*, on demurrer to such plea, that the facts pleaded do not constitute an estoppel by record, or *in pais*.
*Held*, also, that what appellant did do was simply to assert the legal right to be relieved from the burden of waging two suits for the same cause of action. *Pittsburgh, etc., R. W. Co.* v. *Swinney*, 399

18. *New Trial.—Evidence.—Supreme Court.*—The admission or exclusion of evidence can not be questioned on appeal to the Supreme Court, unless assigned as cause for a new trial. *Kenney* v. *Phillipy*, 511

19. *Practice.—Motion to Strike Out Pleadings.*—Overruling a motion to strike out part of a pleading is not an available error. *Keesling* v. *Watson*, 578

20. *Same.—Evidence.—Notes of Judge.—Record.*—The notes of the evidence made and signed by the judge and made a part of the record can not supply the evidence, especially when it does not purport to be all the evidence, and in such case the record can not be deemed to contain the evidence. *Ib.*

21. *Jury.—View of Property.—Evidence.*—Whether or not the trial court has made a proper order for the view of property, which is the sub-

ject of litigation in any case, under the provisions of section 538, R. S. 1881, is a question the Supreme Court can neither consider nor decide when the evidence is not in the record. *Rozell* v. *Anderson*, *591*

22. *Transcript.—Refusal of Instruction.—Statute Construed.*—The *proviso* in section 650, R. S. 1881, is only serviceable or advantageous when a party desires to present to the Supreme Court an alleged error of the trial court, in its refusal to give instructions at his request. *Ib.*

23. *Assignment of Error.*—An assignment of error based on one ground can not be supported by another. *Patterson* v. *State, ex rel.*, *364*

TAXES.

See DEED, 1; RAILROAD, 4 to 6; TOWN, 8.

1. *Sale of Land for.—Tax-Title.—Deed as Evidence.*—A tax deed made upon a sale of land for taxes in the form given by section 224, 1 R. S. 1876, p. 123, is *prima facie* evidence of the recitals therein; but if it recites facts not in the form, it is no evidence of their truth, and in no case is it sufficient evidence of title. *Millikan* v. *Patterson*, *515*

2. *Same.—Evidence.—Title.*—To establish title upon a sale of lands for taxes, it must be shown that every material requirement of the law necessary to authorize the sale, from the listing of the land to the delivery of the deed, has been strictly complied with. *Ib.*

3. *Refunding of.—Statute Construed.—Voluntary Payment.*—Sections 5813 and 5814, R. S. 1881, require that taxes wrongfully assessed shall be refunded, though they have been paid voluntarily, but, in such case, it must appear not merely that the assessment was irregular, but also that the taxes were neither justly nor equitably due.
*Board, etc.*, v. *Armstrong*, *528*

4. *Same.—Guardian and Ward.—Failure to List Ward's Property.—Fraud.—Illegal Assessment.*—Where a guardian, having funds of his ward, fails to list it as required by law, with intent to defraud the revenue, and the same is afterwards unlawfully assessed, and the taxes charged thereon voluntarily paid by the guardian, the statute does not authorize a refunding thereof, the assessment in such case not being *wrongful* in the sense of the statute. *Ib.*

TENDER.

See DEED, 3.

TIME.

See INTOXICATING LIQUOR, 2; SUMMONS.

TITLE.

See CITY, 3; DEED, 2; EASEMENT, 2; EVIDENCE, 4, 5; FRAUDULENT CONVEYANCE; MORTGAGE, 2; PARTITION, 2; RAILROAD, 9, 10; REAL ESTATE, ACTION TO RECOVER, 1; SHERIFF'S SALE; TAXES, 1, 2; VENDOR AND VENDEE, 4.

TOLLS.

See GRAVEL ROAD.

TOWN.

1. *Street Improvement.—Board of Trustees.—Jurisdiction.—Petition of Resident Lot-Owners.*—Under section 3364, R. S. 1881, the board of trustees of an incorporated town acquire jurisdiction of the improvement of a street within the town only when a majority of all the owners of any lots or parcels of land abutting on the street, residing within the town, shall petition the board of trustees for such improvement.
*Case* v. *Johnson*, *477*

2. *Same.—Contract with Town Trustee.—Violation of Penal Statute.*—Under the provisions of the act of December 21st, 1872, defining certain felonies and declaring contracts in respect thereto void (2 R. S. 1876, p. 454; sec. 2049, R. S. 1881), any contract or agreement made by the board of trustees with any town trustee or other officer of the town, for the construction of any public work of any kind for the use of the town, is absolutely void. *Ib.*

3. *Same.—Compliance with Statute.*—In all such cases the rule is uniform that there must be a strict compliance with the provisions of the statute; otherwise the proceedings are illegal and void. *Ib.*

4. *Annexation of Territory.—Order of County Commissioners.—Jurisdiction.—Collateral Attack.*—The proceedings of the board of county commissioners annexing territory to an incorporated town, if jurisdiction was acquired, can not be questioned collaterally. *Cicero* v. *Williamson*, *541*

5. *Same.—Petition.*—When the petition contains enough to show that the subject-matter is within the jurisdiction, its sufficiency in other respects can not be questioned collaterally, nor can the formality of the proceedings of the trustees of the town. *Ib.*

6. *Same.—Names of Owners.*—The failure of the petition to name the owners of the lands sought to be annexed will not warrant a collateral attack upon the action of the county commissioners. *Ib.*

7. *Notice.*—The service of personal notice upon known residents of the county whose lands it is sought to annex is, as to them, necessary to give jurisdiction, and a failure to do so renders the proceeding void upon collateral attack. R. S. 1881, section 3389. *Ib.*

8. *Taxes.—Injunction.—Parties.—Joint Complaint.—Judgment.*—Where several owners of lands unite in a complaint to enjoin an incorporated town from collecting taxes upon their lands, upon the ground that no notice at all had been given, there can be no separate decree in favor of one of the plaintiffs. *Ib.*

9. *Question of Fact.*—Whether territory is or is not contiguous to corporate limits, is a question of fact for the decision of the board of commissioners. *Ib.*

## TOWNSHIP TRUSTEE.

*Physician for Poor.—County Commissioners.*—A physician employed by a township trustee to treat the poor is not entitled to compensation from the county, if the county board has provided adequate medical service for the poor of his township. R. S. 1881, section 5764.
*Robbins* v. *Board, etc.*, *537*

## TRANSCRIPT.

See CRIMINAL LAW, 7; DECEDENTS' ESTATES, 9; JUDGMENT, 4; NEW TRIAL, 2; SUPREME COURT, 22.

## TRIAL BY JURY.

See DRAINAGE, 2; INJUNCTION, 1, 2; MORTGAGE, 5.

1. *Constitutional Law.—Drainage.*—Section 4276, R. S. 1881, providing that questions of fact in proceedings for drainage should be tried by the court without a jury, is constitutional. *Anderson* v. *Caldwell*, *451*

2. *Injunction.*—In a suit for an injunction there is no constitutional right of trial by a jury. *Helm* v. *First Nat'l Bank*, *44*

3. *Mortgage.*—In a suit on a note and mortgage praying foreclosure, there is no constitutional right to a trial by jury.
*Carmichael* v. *Adams*, *526*

## TRUST AND TRUSTEE.

See COUNTY LIBRARY.

*Parol Agreement.—Statute of Frauds.—Conveyance.*—A parol agreement between grantor and grantee, in consideration of their expected marriage, that lands conveyed by absolute deed shall be held in trust for both parties, is void by the statute of frauds. *Mescall* v. *Tully*, 96

TURNPIKE.

See GRAVEL ROAD; HIGHWAY, 6.

UNITED STATES COURT.

See PRACTICE, 1.

USER.

See CITY, 3; HIGHWAY, 1; PUBLIC SQUARE, 2, 3.

VALUE.

See RAILROAD, 8.

VARIANCE.

See CRIMINAL LAW, 5.

VENDOR AND VENDEE.

See DEED; FRAUDULENT CONVEYANCE; MORTGAGE, 2, 4.

1. *Pleading.—Evidence.—Insolvency.—Decree.—Vendor's Lien.*—A vendor's lien may be established without averment or proof of the vendee's insolvency, but the decree can only be for the sale of the land after exhausting other property of the vendee. *Citizens, etc., Bank* v. *Adams*, 280

2. *Same.—Cross Complaint.—Mortgage.—Judgment.—Witness.—Evidence.—Promissory Note.*—Suit on a note and mortgage against the maker and several endorsers, including the payee, judgment by default and foreclosure against all, but the payee, having afterwards got the default set aside, pleaded that she had sold the land to the maker, taking for the purchase-money other notes without security, and that the note and mortgage sued on were never executed to her, and that her assignment was a forgery. She also filed a cross complaint averring the same facts, that the notes taken by her for purchase-money were unpaid, that the maker was insolvent and had no property save the land, and praying that a vendor's lien be declared in her favor, having priority over the plaintiff's judgment; copies of the notes taken were not filed, and the original plaintiff only was made defendant.

*Held*, that the answer was good on demurrer.

*Held*, also, that the cross complaint was good against a demurrer for want of sufficient facts.

*Held*, also, that the defendant was a competent witness for herself.

*Held*, also, that the notes described in the cross complaint were proper evidence for the defendant. *Ib.*

3. *Statute of Frauds.—Possession.—Notice.*—The purchase of lands by parol, payment of the price, possession given and taken under the purchase, make a valid contract, notwithstanding the statute of frauds, and such possession is notice to a subsequent purchaser, so that an action by him for possession will be defeated. *Barnes* v. *Union School Tp.*, 301

4. *Encumbrance.—School Fund Mortgage.—Release by County Auditor.*—The auditor of the county has no authority to release a school mortgage unless the money is paid, and where a party is entitled by his contract to an unincumbered title, he is not compelled to accept a conveyance of land thus encumbered, though the auditor has released the mortgage of record. *Conley* v. *Dibber*, 413

VENDOR'S LIEN.

See VENDOR AND VENDEE, 1, 2.

## VERDICT.

See CITY, 2; CRIMINAL LAW, 6; HIGHWAY, 2; INSTRUCTIONS TO JURY, 2; PRACTICE, 4; SUPREME COURT, 14.

1. *Practice.*—Where a special verdict is not demanded, it is not the duty of the court to submit to the jury a form of special verdict prepared by a party. *Woollen* v. *Whitacre, 502*
2. *Same.—Interrogatories.—Instruction.—Harmless Error.*—Where the jury, finding a general verdict, return answers to interrogatories sent to them, a refusal to instruct them to answer such interrogatories, if they find a general verdict, is harmless. *Ib.*

## WAGER.

See CONTRACT, 2.

## WAIVER.

See INJUNCTION, 2; INSURANCE, 2.

## WHITE WATER CANAL.

See EASEMENT, 2.

## WIDOW.

See DECEDENTS' ESTATES, 7, 8.

## WILL.

See DECEDENTS' ESTATES, 5, 6.

1. *Devise.—Power to Convey.—How Executed and Shown.—Deed.—Intention.*—Where there is a devise of some estate in lands, coupled with a power to convey the fee absolutely, the deed of the devisee made with intent to execute the power will convey the fee, and this intent is matter *in pais* to be collected from all the circumstances of the case, and does not depend wholly upon the terms or recitals in the deed, as a deed of general warranty, purporting to convey the fee upon a consideration fairly equal to the value of the estate. *South* v. *South, 221*
2. *Construction.—Husband and Wife.—Parties.—Marriage, Condition in Restraint of.—Gift.*—A testator devised lands to his widow, gave certain legacies, and then to his widow his personal property, "on condition that she pay $50 per year to my daughter, Martha Fox," and if Martha should marry a second time, then "she shall not be entitled to said legacy from that time on," and "when said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more, and the balance shall be retained by my said wife." Martha became a widow and married again; the widow of the testator also married, and the former sued the latter, holding the property given her by said will, and her husband, to recover an instalment, accruing after Martha's second marriage. All this, and that three-fourths of the fund had not been received by the plaintiff, appeared by the complaint.

*Held*, that the husband of the principal defendant was a proper party by reason of section 5127, R. S. 1881, and the complaint as against him was good on demurrer.

*Held*, also, that the widow did not take the personal property upon a condition subsequent, but a gift to Martha was intended to be paid through her mother as trustee.

*Held*, also, that the condition subsequent annexed to the gift to Martha was unreasonable, being an absolute prohibition of a second marriage, and was void, and the plaintiff was entitled to recover.

*Crawford* v. *Thompson, 266*

## WITNESS.

See CONTRACT, 4, 5; CRIMINAL LAW, 2; DEED, 6; EVIDENCE, 6, 7, 10, 11; HIGHWAY, 3; INSTRUCTIONS TO JURY, 4, 6; PROMISSORY NOTE, 9; RAILROAD, 8; SUPREME COURT, 7, 8; VENDOR AND VENDEE, 2.

*Physician and Patient.—Confidential Relation.—Competency of Evidence.—Witness.*—Under section 497, R. S. 1881, the relation between the physician and his patient is confidential, and the physician can not be permitted to give in evidence, in a court of justice, any information acquired by him in the discharge of his professional duties, to the prejudice or injury of his patient or of his representative.

*Excelsior, etc., Association* v. *Riddle, 84*

## WORDS AND PHRASES.

See CONTRACT, 4; CRIMINAL LAW, 5; DECEDENTS' ESTATES, 3; DEED, 6; INTOXICATING LIQUOR, 2; OFFICE AND OFFICER, 1; PLEADING, 2, 10; RAILROAD, 9; SUMMONS.

## WRITTEN INSTRUMENT.

See ATTORNEY AND CLIENT; CONTRACT, 1, 6; CRIMINAL LAW, 11; EVIDENCE, 1; LANDLORD AND TENANT, 1; SHERIFF'S SALE, 3.

# END OF VOLUME 91.

Fig. 10